

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

12 April 2013

By email: ec.sen@aph.gov.au

Environment Protection and Biodiversity Conservation Amendment Bill 2013



Dear Ms Warhurst

The NSW Minerals Council (NSWMC) is the peak industry association representing the State's \$24.5 billion minerals industry. Our membership includes all major coal producers and explorers operating in NSW, who would be directly affected by the passing of the *Environment Protection and Biodiversity Conservation Amendment Bill 2013* (Bill). Note that NSWMC does not represent the coal seam gas industry.

NSWMC strongly recommends that the Bill is not passed. The Bill is an unnecessary action that:

- Creates conflicting water assessment rules between the NSW and Commonwealth regulatory regimes
- Duplicates existing regulatory requirements, creating unnecessary inefficiency in the assessment framework
- Contradicts the intent of the Act to minimise duplication, commitments by the Council of Australian Government to reduce regulatory burden, and a key theme of the Government's response to the Hawke Review of the EPBC Act to streamline assessment and approval processes
- Contains inadequate transitional provisions that will force some existing mines to cease operations
- Unfairly targets the coal and coal seam gas industries rather than environmental outcomes
- Lacks strategic focus on projects that may pose a significant risk to water resources of national significance.

NSWMC believes that instead of pursuing further legislative changes, the original agreement under the National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development should be fulfilled by finalising the referral protocol between the NSW and Commonwealth Governments.

Our concerns are outlined in further detail below.

The focus should be on implementing the National Partnership Agreement

The National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development (NPA) put in place a mechanism to incorporate the Independent Expert Scientific Committee's (IESC) advice on water issues into the NSW assessment process.

NSWMC understands that negotiations between the NSW and Commonwealth governments on a suitable referral protocol are underway. Despite some delays in this process, we do not believe this is sufficient justification to warrant the introduction of Commonwealth legislation to seize legislative jurisdiction over water issues.

We strongly believe that the Bill should not be passed, and the focus should instead be placed on negotiating a suitable referral protocol to implement an advisory role for the IESC in the NSW assessment process, in line with the originally agreed approach between the States and the Commonwealth.

A Regulatory Impact Statement must be prepared

The rushed introduction of the Bill without a Regulatory Impact Statement that adequately considers the Bill's implications is very concerning. The Government's position is that exemptions from Regulatory Impact Statements should only be granted in exceptional circumstances, including where truly urgent and unforeseen events arise or there is a matter of Budget or other sensitivity¹.



Given the comprehensive regulatory framework for water management and impact assessment within NSW, NSWMC does not believe that there are any urgent or unforeseen events that warrant an exemption from the preparation of a Regulatory Impact Statement. It is critical this is undertaken to allow properly informed debate about the justification for the Bill and its costs and benefits.

The Bill contradicts government commitments to reduce regulatory burden

There is a clear commitment from the Council of Australian Governments (COAG) to streamline and reduce regulatory burdens on business². The Government's response to the Hawke Review of the EPBC Act³ was built around four key themes, one of which is streamlined assessment and approval processes. The proposed Amendment Bill is contrary to both these commitments.

As well as duplicating existing processes, amendments to the Bill passed by the lower house are designed to specifically rule out the potential for future streamlining of Commonwealth and State approvals by prohibiting bilateral approval agreements for the water trigger. This contradicts the intent of the EPBC Act, which under section 3(2) – Objects of Act – states:

“(2) In order to achieve its objects, the Act:

...

(b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and

¹ Department of Finance and Deregulation, "Australian Government Response to the Recommendations of the Independent Review of the Australian Government's Regulatory Impact Analysis Process", December 2012, p5

² COAG Principles of Best Practice Regulation <http://www.finance.gov.au/obpr/proposal/coag-requirements.html>

³ <http://www.environment.gov.au/epbc/publications/pubs/epbc-review-govt-response.pdf>

(c) provides for the intergovernmental accreditation of environmental assessment and approval processes; and

...

(g) promotes a partnership approach to environmental protection and biodiversity conservation through:

(i) bilateral agreements with States and Territories

..."

It is extremely concerning that deliberate steps are being taken to nullify the specific intention of the Act to minimise duplication and increase coordination between States and the Commonwealth.

The Bill will create conflicting water assessment rules at the NSW and Commonwealth levels

In September 2012 the NSW Government released the NSW Aquifer Interference Policy. The policy provides clarification about the requirements for groundwater assessments and outlines objective minimal impact criteria against which development applications are assessed. The policy adds to the framework provided by the *NSW Water Management Act 2000* and related Water Sharing Plans, which establish rules for sharing water between the environmental needs of rivers or aquifers and water users, and also between different types of water use such as town supply, rural domestic supply, stock watering, industry and irrigation. Mines in NSW are incorporated into this water sharing framework and require licenses for any water taken from a water source in accordance with these rules.

The NSW regulatory framework aligns with the National Water Initiative agreed to under COAG in 2004, an objective of which is to provide transparent and statutory-based water planning that deals with key issues such as the natural variability of water systems, major water interception activities, the interaction between surface water and groundwater systems, and the provision of water to achieve specific environmental outcomes⁴.

The Bill creates significant uncertainty around this existing State regulatory framework. There is no clarity about what criteria projects will be assessed against at the Commonwealth level and whether they will be consistent with the NSW rules. In all likelihood there will be different rules applied at the Commonwealth level, leading to a complex framework where proponents are attempting to meet two different sets of requirements applying to the same water resources. This creates an extremely difficult operating environment.

The Bill duplicates existing requirements creating unnecessary inefficiency in the assessment framework

Under the NPA, the NSW Government will refer projects to the Independent Expert Scientific Committee (IESC) for advice at the gateway stage, an early stage in the development assessment process for projects that potentially impact on strategic agricultural land. The gateway stage involves an initial assessment of potential groundwater and agricultural impacts by an independent gateway panel made up of water, agricultural and mining experts. Draft regulations implementing the gateway process were exhibited in December 2012 and are expected to be implemented shortly.

The Bill adds to the increasingly inefficient assessment process, with a single project being referred to multiple independent panels and government agencies, multiple times on the same issue. A summary of the assessment stages and the potential range of bodies providing input on water issues is outlined below:

⁴ <http://nwc.gov.au/nwi>



- NSW gateway stage – The IESC, NSW Office of Water and the Independent Gateway Panel will each review the water related aspects of the proponent's gateway application and provide input into the formation of the gateway certificate conditions
- NSW development assessment stage – The NSW Office of Water, the NSW Department of Planning and Infrastructure and the Office of Environment Heritage assess the water-related aspects of the application and the Dams Safety Committee and Sydney Catchment Authority also provide input on relevant applications. The independent NSW Planning Assessment Commission may be appointed to undertake a detailed review of important aspects of the project, including water. The NSW Planning Assessment Commission is also the delegated decision making authority for most mining applications, meaning it can be involved twice in the process.
- Commonwealth assessment stage – The IESC will again review the water related aspects of the application against unknown criteria, and the Commonwealth will impose additional approval conditions.

This is an astonishingly complex process of review and assessment. Given the extensive input on water issues from independent panels and government agencies, there is clearly no justification for greater oversight at the Commonwealth level. This is supported by a previous Rural and Regional Affairs and Transport Legislation Committee inquiry into a proposed water trigger, which found that:

... the committee agrees with the Hawke review's findings that while there is scope within the EPBC Act to complement water initiatives, including it as a matter of national environmental significance is not the best mechanism to achieve such a result. The Committee also finds that current Commonwealth and State initiatives render the bill duplicative and unnecessary⁵.



The proposed transitional arrangements for current project assessments are insufficient

Only exceptional circumstances could justify changing assessment rules and requirements midway through a project's assessment process – circumstances that are not applicable to this issue, given the existing rigorous assessment framework that already applies to water. However, the Bill proposes that controlled actions for which the IESC has not yet provided advice will be subject to the new requirements.

While there is no clarity about what the assessment rules will be, there is now the potential that proponents who have prepared, and in some cases submitted, their assessment documentation will now need to revise these assessments so they can be tailored to the Commonwealth's new requirements. Depending on what standards the Commonwealth applies, there could be changes to project design that are needed to meet the new requirements.

This in no way provides a stable regulatory environment that encourages investment in Australia. NSWMC believes that any project that has been referred to the Commonwealth for a referral decision at the time the legislation is introduced should not be subject to the new requirements.

The inadequate transitional provisions will force some existing operations to cease

⁵ Report of the Rural and Regional Affairs and Transport Legislation Committee – EPBC (Protecting Australia's Water Resources) Bill 2011

Given the dynamic nature of mining, it is common for a statutory licence, such as the environment protection licence issued by the NSW Environment Protection Authority, to be modified at various times during the life of a mine. These subsidiary licences are required in addition to the overarching planning approval for a mine.

The transitional provisions in the Bill will have the consequence that some coal mines will be required to obtain EPBC Act approval for the continuation of activities that are already authorised by their NSW planning approvals. This requirement will occur when an existing mine obtains a relatively minor modification to a subsidiary approval.

For example, consider a coal mine that operates pursuant to a NSW planning approval but which is not the subject of an approval under Part 9 of the EPBC Act or a Ministerial determination under Division 2 of Part 7 of that Act. The existing mine incidentally impacts a local aquifer, but that impact is authorised by the NSW planning approval and miscellaneous subsidiary approvals.

In this example, item 22(1)(a), (2)(f) and (3) in Part 2 of the Bill will have the practical effect of exempting the continued operation of the mine from being subject to the Bill's new water trigger. However, this exemption will cease immediately upon the mine procuring a modified "specific environmental authorisation", such as a relatively inconsequential variation of its environment protection licence.

In this scenario, given the mine is incidentally interfering with a local aquifer, it would be imprudent for the mine operator to not immediately lodge a s68 referral with the Minister in respect of the mining operations. This will have significant ramifications for the mine operator and employees because the mine owner must comply with s74AA(1) and therefore cease operations and make its workforce idle until there has been a Ministerial determination under either s75 or Part 9 of the Act.



This is an unacceptable situation. The transitional arrangements must be broadened so they do not apply to existing mining operations even when modifications are made.

The targeting of coal and coal seam gas is inequitable

The fact that the Bill only targets coal mining and coal seam gas operations blatantly discriminates against these industries. To provide some context, mining in NSW is a small user of water resources, using only 1.4% of the total water consumed in the State. In contrast, agriculture uses 49.2%.

As the previous Rural and Regional Affairs and Transport Legislation Committee inquiry concluded:

*"The committee concurs that matters of national environmental significance should focus on the environmental outcome, rather than a specific industry."*⁶

Rational arguments have not been presented as to why particular industries, rather than environmental outcomes, are being targeted in the Bill.

It is likely that all coal mining projects will be captured by the new trigger

The broad definitions of "water resource", "significant impact" and "large coal mining development" mean that it is difficult to see circumstances where a coal mining project will not be subject to the new requirements.

⁶ Senate Standing Committee on Rural and Regional Affairs and Transport Legislation, Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011, February 2012

This is in direct contrast to the Australian Government's response to the Hawke Review, where the Government has recommended several reforms to reduce the number of unnecessary referrals and to ensure that controlled actions are those of most significance for the Commonwealth to manage with its limited resources.

There must be a framework developed that identifies water resources of national environmental significance, as well as only focusing on projects that have could have a significant impact on these water resources, so that the Commonwealth is not involved in unnecessary assessments.

If the water trigger under the EPBC Act proceeds, mitigate the negative impacts

NSWMC does not believe the Bill is warranted and recommends that it is not passed. However, failing this, the negative implications of the Bill must be addressed through the following actions:

- A Regulatory Impact Statement (RIS) must be prepared to allow properly informed debate about the merits of the Bill and its costs and benefits
- Transitional provisions must ensure that any project that has been referred to the Commonwealth at the time the legislation commences is not subject to the new requirements
- Transitional provisions must protect existing mining operations from requiring approval when modifying their operations or seeking subsidiary licence and management plan approvals
- A framework to identify water resources of national environmental significance must be developed to avoid unnecessary Commonwealth assessment of projects, and only projects that could significantly impact on these resources should be captured by the new requirements
- The proposed prohibition on approval bilateral agreements must be removed to allow opportunities for streamlining State and federal approvals to be explored
- The Commonwealth should adopt the same assessment criteria as the NSW regulatory framework to avoid conflicting requirements
- The trigger should focus on the environmental outcomes, rather than two specific industries.



Thank you for the opportunity to comment on the Bill. I trust you will consider our recommendations.

Yours sincerely

Stephen Galilee
CHIEF EXECUTIVE OFFICER