



Environmental
Defenders Office

**Submission on the Environment Protection and
Biodiversity Conservation Amendment (Reconsideration
of Decisions) Bill 2024**

18 October 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

Submitted to:

Senate Environment and Communications Legislation Committee
Parliament of Australia
Canberra ACT 2600
Via [Submission Portal](#)

For further information on this submission, please contact:

Rachel Walmsley
Head of Policy and Law Reform

Frances Medlock
Government and Parliamentary Liaison

Acknowledgement of Country

EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect the environment and First Nations' cultural heritage through both First Laws and Western laws. We recognise that sovereignty was never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by Aboriginal and Torres Strait Islander peoples since the beginning of colonisation.

EDO recognises self-determination as the right to freely determine one's political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' rights to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws which existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure that the environment and ecosystem which nurtures, supports, and sustains human life, is also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the Land.

A Note on Language

We acknowledge that there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. We acknowledge that not all First Nations people will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is used to describe the laws which exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. EDO respects all First Laws and values their inherent and immeasurable worth. EDO recognises that there are many different terms used throughout First Nations for what is understood in the Western world as 'First Laws'.

EDO's role

EDO is a non-Indigenous community legal centre, which works alongside First Nations around Australia and the Torres Strait Islands in their efforts to protect their Countries and Cultures from damage and destruction. EDO has and continues to work with First Nations clients who have interacted with Western laws, including Western cultural heritage laws in many ways, including litigation and engaging in Western law reform processes. In respect for First Nations self-determination, EDO has provided high level key recommendations for Western law reform to empower First Nations to protect their Countries and Cultures. The high-level recommendations in this submission comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and Cultures.

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024 (**the Bill**). EDO does not support the passage of the Bill and is of the view that it limits the opportunity for both public participation and environmental protection.

In our view, the rationale for the Bill is flawed, and the changes to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) to impose a time limit on third party reconsideration requests proposed in the Bill are unnecessary.

The amendments would only serve to entrench identified and well-known problems with the EPBC Act, including the broad failure of the legal regime to halt nature destruction and decline, and a lack of community trust in decisions. In the context of ongoing reform of the Act, which aims to fix this trust deficiency, the Bill represents a piecemeal amendment that does not address any problems identified in the 2020 Independent Review of the EPBC Act, carried out by Professor Graeme Samuel AC.

Moreover, the grounds on which a reconsideration can be requested under the Act already provide a limit on when the power can be exercised by the Minister. It is clear that time elapsed after the original controlled action decision should not be the defining feature of a reconsideration, but instead the potential impact, based on the science, an action could have or is having on a protected matter.

The Explanatory Memorandum refers to salmon farming in Macquarie Harbour, Tasmania – the subject of a current reconsideration request – as a rationale for the Bill. In EDO's view, this matter provides a clear example of why existing reconsideration provisions, which do not apply a timeframe for third party requests, is so important and should be **retained**.

The expansion of the salmon industry in Macquarie Harbour, and subsequent detrimental impacts on Tasmanian Wilderness World Heritage Area and the endangered Maugean Skate, have been inadequately curtailed by the original controlled action decision made under the EPBC Act in 2012. In light of the clear science demonstrating harms to these matters of national environmental significance, the reconsideration request power is an important safeguard that should – if the original decision is revoked by the Minister – prevent what could be the first ray or shark to go extinct in modern times.

The case also illustrates the need for our environmental regulatory frameworks to be able to respond to changes in scientific knowledge about, and impacts caused by, climate change. The devastating impacts of climate change continue to be felt around Australia, and unprecedented events such as the Black Summer bushfires have already significantly altered the ecological baseline on which decisions about affected threatened species were made. To adequately protect nationally significant flora, fauna, and places, our laws must be able to respond to the constantly evolving scientific understanding of species, ecosystems, and the climate.

Recommendation:

EDO recommends the Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024 should not proceed.

Introduction

On 10 October 2024, the Senate referred the Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024 (**the Bill**) to the Environment and Communications Legislation Committee for inquiry and report by 14 November 2024. Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Bill and make a submission to the Senate inquiry. EDO does not support the passage of the Bill, and is of the view that it unnecessarily limits the opportunity for both public participation and environmental protection.

EDO is engaged with the ongoing reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), and has provided expert input into the law reform process over the course of several years.¹ In line with the findings of the 2020 Independent Review of the EPBC Act, EDO notes that there is significant community distrust of our national environmental laws, including in the ability of the Act to deliver for the environment, and for decisions to transparently reflect community concern.² It is crucial that this trust deficiency is fixed, and EDO supports the stated intention of the Federal Government to do so.³

Conversely, this Bill seeks to limit the ability of third parties to request reconsideration of a controlled action decision. This would have the effect of further limiting community rights, in the context of a legal regime that already does not have the trust of the community to deliver outcomes for Australia's environment.⁴ This is an unnecessary and piecemeal change in the context of a broader law reform process.

As noted by Professor Graeme Samuel AC in the Independent Review of the EPBC Act, 'the ability of the public to hold decision-makers to account is a fundamental foundation of Australia's democracy and improves the performance of law over time,' and that to characterise legitimate legal processes carried out under the Act as 'lawfare' is artificial.⁵ Despite recent media claiming public interest litigants are abusing review processes,⁶ significant evidence suggests that this does not occur in practice.⁷ Community participation in decision-making, including through legal review, is essential for the operation of the environmental law regime and must be maintained – and ultimately improved. The Bill is a step in the wrong direction.

¹ EDO, [Reforming Australia's Nature Laws](#).

² Graeme Samuel, [Independent Review of the EPBC Act – Final Report](#) (October 2020) 9. (**Independent Review of the EPBC Act**)

³ See, 'Restoring integrity and trust to systems and environmental laws', Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for the environment, better for business* (December 2022).

⁴ See, Independent Review of the EPBC Act, 82.

⁵ Independent Review of the EPBC Act, 92.

⁶ See e.g., Menzies Research Centre calls Australia environmental lawfare 'capital of the world' Greg Brown June 30, 2024, <https://www.theaustralian.com.au/nation/menzies-research-centre-calls-australia-environmental-lawfare-capital-of-the-world/news-story/7624b4d3f23c197ee3a9d2edf49e6d4b>

⁷ Annika Reynolds and Andrew Ray, 'Green Lawfare: Does the Evidence Match the Allegations? An Empirical Evaluation of Public Interest Litigation under the EPBC Act from 2009 to 2019', *Environmental and Planning Law Journal* (2020) 37 EPLJ 497, Justice Rachel Pepper, 'Ms Onus And Mr Neal: Agitators In An Age Of 'Green Lawfare' (2017) 90 AIAL Forum 52, available at <https://classic.austlii.edu.au/au/journals/AIAdminLawF/2017/29.pdf>.

The issue of salmon farming in Macquarie Harbour in Tasmania, raised in the Explanatory Memorandum, illustrates why legitimate third party reconsideration requests are in fact crucial and should *not* be limited. The 2012 decision permitting the expansion of salmon farming contained conditions to protect the endangered Maugean skate, yet current science has identified a severe decline in the skate's number, illustrating that the conditions in the decision have failed to protect the species as intended at that time. In EDO's view, it is entirely appropriate for Federal Environment Minister to have the power under the EPBC Act to reconsider the 2012 decision to provide effective protections under federal laws to prevent extinction, and for third parties to request that she do so, on the basis of new information and significant risks not identified at the time of the original decision 12 years ago.

Scientific understanding of species and ecosystems and how they are impacted by activities is constantly evolving, along with the changes in the state of our environment and climate. It is therefore essential that our regulatory framework is able to respond to this changing knowledge and circumstance to protect these nationally significant matters.

Further, it is crucial that community rights in Australia's national environmental regime are upheld and improved, rather than wound back. Third party rights to seek environmental protection are known to be an essential part of effective, quality decision making and regulatory practice.⁸ To this end, EDO does not support any moves to reduce the opportunity or timeframe for community members to request reconsiderations, and recommends that the Bill does not proceed.

This submission addresses:

- 1. Process for reconsideration of controlled action decisions under the EPBC Act**
- 2. Existing limits to reconsideration of controlled action decisions**
- 3. Case study: Macquarie Harbour**

1. Process for reconsideration of controlled action decisions under the EPBC Act

The first object of the EPBC Act is to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance (**MNES**).⁹ To this end, the assessments and approval regime under the Act is concerned with actions which will have a significant impact on those MNES, and therefore which require national oversight. The decision whether or not an action will fall under the jurisdiction of the EPBC Act is a controlled action decision.¹⁰

Section 78 of the EPBC Act provides the Federal Environment Minister with limited power to vary or substitute a controlled action decision, including if the action in question was determined not to be a controlled action. Section 78A provides a process by which a person, other than a State or Territory

⁸Independent Review of the EPBC Act, 92. See also, Productivity Commission: Major Project Development Assessment Processes (2013).

⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3. (**EPBC Act**)

¹⁰ EPBC Act, s 75.

Minister, may request the Minister to reconsider a decision on the basis of specific criteria outlined in section 78(1)(a) to (ca). The term ‘a person’ does not carry a special definition. Subsequent provisions require the Minister to inform the proponent, relevant Ministers, and invite public comment for the period of 10 business days on the reconsideration.

Impact of the Bill

Currently, there is no time limit provided under section 78A for when a person may request the Minister to reconsider a controlled action decision about an action after the original decision has been made, nor a time limit provided for processing reconsideration requests. The Bill adds a new section 78A(2)(b) to limit the ability of a person other than a State or Territory Minister to request a reconsideration to within 36 months of the original decision being made. If the Bill is passed, this would mean that from the date of the original controlled action decision, persons – which includes both third parties and proponents – will only be able to lodge a reconsideration request for three years. The Bill does not propose to limit who may apply for reconsideration or under what grounds.

Under section 79, a standalone provision allows for State and Territory Ministers to request reconsideration by the Federal Minister within 10 days of being notified of the controlled action decision. The Bill does not affect this process. However, the Bill amends section 78A to allow for State and Territory Ministers to request reconsideration after the new time limit of 36 months has expired, where the action in question takes place in the respective State or Territory of that Minister.

In addition, reconsideration requests can be, and are, made by proponents in relation to decisions that an action *is* a controlled action and therefore must be assessed under the EPBC Act. The changes proposed in the Bill would similarly limit the timeframe for these requests.

2. Existing limits to reconsideration of controlled action decisions

Crucially, a controlled action decision cannot be reconsidered if an approval has been granted or the action has been taken.¹¹ Sections 78 and 78A, which the Bill seeks to amend, apply only to the decision as to whether an action is a controlled action and whether it therefore must be assessed and approved under the EPBC Act to proceed.

This is significant because the EPBC Act provides pathways for the Federal Environment Minister to (under certain circumstances) manage the impacts of an approved action by amending conditions or revoking the approval.¹² As that is not possible where there is no approval, the reconsideration process is a safeguard for those actions that do not have ongoing scrutiny by the Federal Government. Many controlled action decisions where the Minister has determined no approval is necessary rely heavily on state or local regulators adequately managing impacts of the action, including impacts on MNES. The right of third parties to bring matters to the Federal Minister’s attention through a reconsideration request is a crucial check and balance on these state and local regulators (who are unlikely themselves to bring these matters to the Minister’s attention).

The ability of a person to request reconsideration however is limited by specific grounds set out in the Act.

¹¹ EPBC Act, s 78(3).

¹² EPBC Act, s 143 – 145.

Grounds for reconsideration

The decision whether an action is a controlled action can only be reconsidered in a limited set of circumstances. The Minister must be satisfied that the grounds raised by the person requesting reconsideration have been met. This provides a significant safeguard and limit to when reconsiderations can be requested by third parties, and places the onus on the person requesting the reconsideration to provide information to establish the grounds for the Minister's satisfaction.

Section 78 of the EPBC Act provides that the Minister may revoke a controlled action decision where there is:

- (a) **substantial new information** about the impacts the action has or will have, or is likely to have on matters protected by a provision in Part 3 of the EPBC Act (section 78(1)(a)), or,
- (b) **a substantial change of circumstances** that was not foreseen at the time of the first decision, and which relates to the impacts the action has or will have, or is likely to have on matters protected by a provision in Part 3 of the EPBC Act (section 78(1)(aa)).

Other grounds include where an action has been found to be not a controlled action under the EPBC Act because of a bilateral agreement, bilaterally agreed management arrangement, or authorisation process, which is no longer operational (section 78(1)(ba)); and where an action has been classified as not a controlled action because of a declaration under section 33 or 37A, which is no longer operational (sections 78(1)(c) and 78(1)(ca)).

Finally, the Minister may also revoke a controlled action decision when that decision was that the action was not a controlled action because the Minister believed the action would be taken in a particular manner, and the Minister is now satisfied the action is not being, or will not be, taken in the manner identified (section 78(1)(b)).

In all cases it's quite clear that circumstances or information must exist at the time of the reconsideration request that did not at the time of the original decision. In EDO's view, this is a valid basis upon which to request a reconsideration of a controlled action decision, especially where a significant impact to an MNES could result or has already occurred.

Impact of grounds for reconsideration

The grounds outlined at section 78(1) rely on the establishment of factual circumstances by the third party, who must provide evidence to substantiate a reconsideration request under both the EPBC Act, and *Environment Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations)*.¹³ For example, a request in relation to substantial new information about the action, under section 78(1)(a) must contain the new information which was not considered when the original decision was made, and demonstrate that a change in the potential impacts of the action is likely to happen with a high degree of certainty.

Likewise, a request based on section 78(1)(aa), which requires the clear identification of a substantial change in circumstances, must identify why those circumstances were unforeseen at the time the original decision was made, and demonstrate that a change in the potential impacts of the action is likely to happen with a high degree of certainty.

¹³ See Part 4A.

Without such grounds being substantiated, the reconsideration request will not be valid, and the original decision will stand.

Even if the request is valid and the Minister considers the reconsideration, this does not mean he or she will revoke the original decision. The Minister must be satisfied that the grounds have been met, and that revocation and substitution are warranted.¹⁴ This demonstrates that the reconsideration framework does not allow for frivolous or vexatious claims from third parties. The power cannot be exercised by the Minister absent the specific grounds contemplated in section 78.

How much time has elapsed since the original decision is, and should be, irrelevant – where circumstances have materially changed, or new scientific information has come to light, decisions should be re-evaluated. It is EDO's view that the grounds in section 78A provide an effective safeguard to limit cases in which a reconsideration should be exercised.

Reconsideration in the context of climate change

There must be mechanisms to account for changing environmental conditions which will continue to decline as our climate changes,¹⁵ and the impact of these conditions on the matters the EPBC Act is designed to protect. For example, updated conservation advice for the Maugean Skate illustrates that climate change and associated extreme weather events compound pre-existing threats, and challenge the capacity of the Skate to survive. The consequence of climate change, in conjunction with the cumulative impacts of other threats (i.e., salmon farming), could prove catastrophic if not remediated.¹⁶ The warming of ocean temperatures, particularly during summer heat events, is a substantial change in circumstance not foreseen at the time of the first decision.¹⁷

Similarly, the bushfire season of 2019-2020 caused widespread damage to ecosystems, landscapes, and a significant loss of wildlife. The damage caused by this event, which will only become more common due to climate change, illustrates how climate change can change the Australian landscape and the environmental baseline of our biodiversity conservation and natural resource management frameworks. Widespread damage to ecosystems, landscapes and the significant loss of wildlife caused by those fires means that any assumptions underpinning environmental assessment, decision-making and policies should be revisited to consider the impacts of the bushfires.¹⁸ It is essential that there are avenues to revisit decisions about MNES in light of unforeseen climate-related disasters, and to ensure that decisions and approvals are appropriately

¹⁴ Department of the Environment and Energy, *EPBC Act Policy Statement: Reconsideration: Implementing the requirements of sections 78, 78A, 78B and 78C of the EPBC Act* (2019), available at <https://www.dcceew.gov.au/sites/default/files/documents/epbc-act-policy-reconsideration.pdf>, 7-8.

¹⁵ See, William J Ripple et al, The 2024 state of the climate report: Perilous times on planet Earth, *BioScience*, 2024; biae087, <https://doi.org/10.1093/biosci/biae087>.

¹⁶ Department of Climate Change Energy Environment and Water (2023) *Conservation Advice for Zearaja maugeana (Maugean skate)* effective from 6 September 2023, accessible at: <http://www.environment.gov.au/biodiversity/threatened/species/pubs/83504-conservation-advice-06092023.pdf> 23. (**Conservation Advice for Maugean skate**)

¹⁷ See, [EDO correspondence to the Hon Tanya Plibersek MP, Minister for the Environment and Water \(20 November 2023\)](#).

¹⁸ See, [EDO, Environmental assessment and decision making for development on fire-affected land - Options for re-assessment under the EPBC Act \(2021\)](#).

conditioned as the threat of climate change compounds and exacerbates existing threats from approved actions on MNES.

3. Case study: Macquarie Harbour

The Explanatory Memorandum for the Bill cites the salmon farming expansion in Macquarie Harbour, Tasmania (EPBC 2012/6406) and subsequent reconsideration request as an example of why third party reconsideration requests should be limited.¹⁹ In EDO's view, the case study instead demonstrates why the ability of third parties to seek reconsideration of a controlled action decision, even where years have lapsed since the original decision, is a crucial accountability and integrity mechanism that assists in ensuring Australia's domestic and international commitments are adhered to when it comes to protecting nature and preventing species extinction.

Background

In 2012, a large expansion of salmon farming by three companies – Tassal, Huon Aquaculture, and Petuna was allowed to proceed in Macquarie Harbour following an assessment of the proposal by the Tasmanian Marine Farming Planning Review Panel (**Panel**) and a referral under the EPBC Act.

In its assessment of the proposed expansion, the Panel recommended that the new Marine Farming Development Plan for Macquarie Harbour include a cap on the salmon numbers (i.e. biomass) which was only to be increased where environmental indicators demonstrated environmental impacts, such as the presence of opportunistic species such as benthic worms and bacteria, were under control. The proposed cap on maximum biomass was to be based on the modelling of the assimilative capacity of Macquarie Harbour for salmon farming pollution. In their submissions in response to planned expansion, environmental groups raised concerns about the assumptions underpinning this modelling.

Based in part on the Panel's assessment, the then-Environment Minister the Hon Tony Burke decided on 3 October 2012 that the proposed salmon farming expansion in Macquarie Harbour (**the Action**) did not require approval under the EPBC Act provided it complied with the requirements outlined in a Particular Manner Notice ostensibly to protect the endangered Maugean Skate and the Tasmanian Wilderness World Heritage Area (**TWWHA**). The Particular Manner Notice attached to the Minister's controlled action decision required that the biomass of salmon in the harbour not exceed 52.5% of the modelled "maximum sustainable biomass" of 29,500 tonnes, being approximately 15,500 tonnes. Under these requirements, the biomass cap was to be reviewed by the Tasmanian Government in 2013.

In the following years, the biomass cap set by both the Department of Primary Industries Water and Environment (**DPIPWE**) and as delegated to Tasmanian Environment Protection Authority (**EPA**) Director, ranged between 19,000 tonnes and 21,500 tonnes.²⁰ It was not until January 2017 that the EPA Director formally decided to reduce the biomass for the harbour to 14,000 tonnes, which was

¹⁹ The Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024, Explanatory Memorandum.

²⁰ Huon Aquaculture Company Pty Ltd, Macquarie Harbour Submission to EPA (January 2017) accessed at <http://web.archive.org/web/20180401163955/https://www.huonaqua.com.au/wp-content/uploads/2017/03/Huon-Aquaculture-response-to-EPA-draft-biomass-determination-REDACTED-for-public-release-NEW-1.pdf>.

eventually reduced to a year-long biomass limit for the harbour at 12,000 tonnes.²¹ However, the EPA Director's determination allowed Tassal to farm an extra 4,000 tonnes of additional salmon until January 2018 provided that implemented an experimental "waste capture system".

In June 2017, Huon Aquaculture commenced several legal proceedings seeking to challenge the validity of the EPA Director's biomass determinations, and the validity of the EPBC Act decision that authorised all three salmon farms to operate in Macquarie Harbour. In these cases, Huon Aquaculture maintained that the harbour could not safely sustain the level of fish allowed by the EPA Director.

By late November 2017, the EPA confirmed that significant farmed fish mortalities had been reported by all three companies operating in the harbour. Petuna Seafoods lost approximately 3 per cent of smolt stock, Huon Aquaculture lost fish from one trout pen. Tassal did not confirm the extent of its losses.²²

Two days after the State election, and during the Federal Court's hearing of Huon Aquaculture's legal case, the EPA Director cut the biomass limit to 9,000 tonnes on 23 March 2018. In discussing his decision, the EPA Director admitted that science and modelling used as the basis for the expansion of salmon farming in Macquarie Harbour in 2012 was "flat wrong".²³ This was confirmed by the IMAS report on the health of Macquarie Harbour released on 21 March 2017, which showed that despite the measures taken to reduce biomass in the harbour, very low levels of dissolved oxygen in mid- and bottom-waters continued during Spring 2017 and there had been a decline in benthic faunal abundance, including within the TWWHA.²⁴

By 2017, there had been a failure by Tasmanian regulators to set biomass caps in Macquarie Harbour in an effective or timely manner in response to declining environmental conditions. The EPA Director's 2017 decisions to reduce the cap and issue the associated management directions that allowed for waste capture technology, placed excessive weight on short-term economic considerations in the absence of scientific certainty on the precise impacts and likely recovery of the environment.²⁵ The delay in the setting of the biomass cap also resulted in excessive stocking of leases by at least one operator, which in turn made future decisions on sustainable stocking density and biomass caps more challenging.

Huon Aquaculture's Federal Court challenge was ultimately unsuccessful. Given the length of time since the Minister's EPBC Act Particular Manner Notice was issued in 2012, Huon Aquaculture's

²¹ EPA responds to media regarding Macquarie Harbour salmon farming* 28 April 2017 accessed at <http://web.archive.org/web/20180120035325/http://epa.tas.gov.au/pages/news.aspx?newsstory=3696>

²² Spate of finfish deaths in Macquarie Harbour after warm spell, The Mercury dated 27 November 2017, accessed at: <https://www.themercury.com.au/business/spate-of-finfish-deaths-in-macquarie-harbour-after-warm-spell/news-story/1439dc6bae2c09c24d1dec29baf5dd01>

²³ Macquarie Harbour salmon expansion science 'wrong', ABC News on 23 March 2018, accessed at: <https://www.abc.net.au/news/2018-03-23/macquarie-harbour-salmon-expansion-science-wrong-admits-epa/9579140>

²⁴ Ross and Macleod (2018) *Environmental Research in Macquarie Harbour FRDC 2016/067: Understanding oxygen dynamics and the importance for benthic recovery in Macquarie Harbour PROGRESS REPORT Approved by the Project Steering Committee and FRDC on 8/02/2018* IMAS.

²⁵ To read a copy of the EPA Director's reasons, click here: <http://web.archive.org/web/20200329064414/https://epa.tas.gov.au/regulation/salmon-aquaculture/macquarie-harbour/management-determinations#tassal>

failure to avail itself of other opportunities to challenge that decision, including seeking the Minister's reconsideration of the decision under section 78 of the EPBC Act, the Court decided on 6 July 2018 that the balance of convenience weighed against it exercising its discretion to grant the declaratory relief that Huon Aquaculture was seeking.

While the Federal Court did not finally rule on Huon Aquaculture's substantive arguments, it did find that Huon Aquaculture might have sought the reconsideration of the controlled action decision under section 78 of the EPBC Act based on substantial unforeseen change(s) in circumstances, including:²⁶

- (a) the failure of the Tasmanian Government review process for the setting of a new total biomass limit;
- (b) the failure of the Tasmanian Government to set a revised total biomass limit such that the interim biomass limits set by paragraph 2(f) of the Particular Manner Notice of 15,500 tonnes had been permitted to lapse; and
- (c) that the marine farmers named in the original controlled action decision were no longer jointly undertaking the action.

By May 2018, the EPA Director had confirmed that at least 1.35 million salmon had died in Macquarie Harbour since October 2017.²⁷ The fish deaths resulted from an outbreak of Pilchard Orthomyxovirus (**POMV**). Following that revelation, in July 2018, the EPA Director set the biomass cap in Macquarie Harbour to 9,500 tonnes until 2020. While, this time, no additional biomass was allocated based on the use of waste capture systems, Huon Aquaculture still argued that the limit simply reflected the current stocking levels in the harbour, rather than the conservative stocking levels necessary to respond to the poor environmental conditions recorded in the IMAS February 2018 report.²⁸ Huon Aquaculture linked the numerous large mass fish kills in the harbour from POMV to the high stocking rates facilitated by the waste capture systems and the declining environmental health of the harbour. It called for a biomass cap in the vicinity of 6000 tonnes to be imposed. Those calls were ignored by Tasmanian regulators.

Effects of salmon farming expansion on the endangered Maugean Skate

While there were obvious impacts of declining water quality on the farmed salmon in Macquarie Harbour, the endangered Maugean Skate did not escape the worst effects of the nutrient loading and reduced dissolved oxygen levels resulting from the salmon farming expansion.

²⁶ *Huon Aquaculture Group Limited v Minister for the Environment* [2018] FCA 1011 at [224].

²⁷ *Macquarie Harbour salmon: 1.35 million fish deaths prompt call to 'empty' waterway of farms*, ABC News, dated 29 May 2019, accessed at: <https://www.abc.net.au/news/2018-05-29/salmon-deaths-in-macquarie-harbour-top-one-million-epa-says/9810720>

²⁸ To read a copy of the Huon Aquaculture's 6 April 2018 submission reasons, click here: <http://web.archive.org/web/20200329064414/https://epa.tas.gov.au/regulation/salmon-aquaculture/macquarie-harbour/management-determinations#tassal>

Being a long-lived and cryptic fish, the skate is difficult to study. However, since at least 2018, scientists have been warning that salmon farming in Macquarie Harbour may be driving the Maugean Skate species to extinction.²⁹

In May 2023, IMAS scientists released a study showing that, in the years since salmon farming expanded in Macquarie Harbour, the Maugean Skate population plummeted by a massive 47%.³⁰ This study followed other scientific papers which pointed to the fact that Macquarie Harbour was the skate's only remaining habitat,³¹ and that water quality (and dissolved oxygen levels) in Macquarie Harbour would improve if salmon farming was reduced or removed altogether from the harbour.³² A Conservation Advice released by the Department of Climate Change Energy Environment and Water for the species was released in September 2023. This Conservation Advice directly linked the reduction in the Maugean Skate population to the decline in water quality resulting from salmon farming in the harbour and set out numerous actions that would need to be taken to reverse the trend.³³ Crucially, this new scientific information was not available at the time of the Federal Environment Minister's 2012 controlled action decision but pointed to an urgent need for action.

This information prompted several civil society and environmental not-for-profit groups, including EDO's clients the Australian Marine Conservation Society and Humane Society International (Australia), to write to the current Federal Environment Minister, Tanya Plibersek, asking her to reconsider the 2012 EPBC Act controlled action decision.³⁴ Some 15 months after the original requests, the Minister is still considering what action to take (if any) in response to the requests.

Although there was an indication that salmon farming was having a detrimental impact on Macquarie Harbour water quality by at least 2016, the level of scientific confidence in the causes of these declines increased by May 2023. The Tasmanian Government's failure to properly regulate salmon farming in Macquarie Harbour led to a situation where the Maugean Skate population significantly declined. Ministers in the Tasmanian Government have promised to back the industry

²⁹ *Scientists urge action to protect habitat of Tasmania's endangered ancient skate* ABC News dated 2 December 2018 accessed at: <https://www.abc.net.au/news/2018-12-02/skate-study-endangered-fish-waters-tasmania/10572918>. See also Kirkpatrick Jamie B., Kriwoken Lorne K., Styger Jennifer (2019) The reverse precautionary principle: science, the environment and the salmon aquaculture industry in Macquarie Harbour, Tasmania, Australia. *Pacific Conservation Biology* 25, 26-33. <https://doi.org/10.1071/PC17014>

³⁰ David Moreno and Jayson Semmens (2023) *Interim report - Macquarie Harbour Maugean Skate population status and monitoring*. IMAS. https://imas.utas.edu.au/_data/assets/pdf_file/0007/1655611/Maugean-skate-2021-interim-report-FINAL.pdf/_nocache

³¹ Karen Wild-Allen, John Andrewartha, Mark Baird, Lev Bodrossy, Elizabeth Brewer, Ruth Eriksen, Jenny Skerratt, Andrew Revill, Kendall Sherrin, Dan Wild. (2020), *Macquarie Harbour Oxygen Process model (FRDC 2016-067)*: CSIRO Final Report. CSIRO Oceans & Atmosphere https://www.frdc.com.au/sites/default/files/products/FRDC_MH_Final_Rep_June_2020.pdf

³² David Moreno, Jawahar Patil, Bruce Deagle & Jayson Semmens (2022) *Application of environmental DNA to survey Bathurst Harbour (Tasmania) for the Endangered Maugean Skate (Zearaja maugeana)*. IMAS. https://www.imas.utas.edu.au/_data/assets/pdf_file/0009/1615788/Project-1.33-Final-Report.pdf

³³ Conservation Advice for Maugean skate (2023).

³⁴ The 2023 letters of these groups to the Federal Environment Minister can be accessed here: <https://consult.dcceew.gov.au/epbc-macquarie-harbour>

“to the hilt”.³⁵ It is apparent from such statements that the Tasmanian Government would not voluntarily seek the intervention of the Federal Environment Minister in the regulation of the industry.

This case study demonstrates that the right of third parties to write to the Minister at any time to seek reconsideration of a controlled action decision, and if justified by the science, further intervention in the regulation of the environmental impacts of an action, is crucial to ensuring Australia continues to adhere to its international obligations to prevent species’ extinctions and protect World Heritage.

Conclusion

Finally, it is worth emphasising again that the reconsideration of controlled action decisions is a process entirely different from any challenge to *approval* decisions under the EPBC Act. A reconsideration request for a controlled action decision cannot be made if the action in question has already been taken and concluded,³⁶ or if the Minister has granted or refused approval under Part 9 of the EPBC Act. An open timeframe for third parties or proponents to request reconsideration does not, therefore, ‘cast doubt over the certainty of every approval granted under the EPBC Act’,³⁷ because it cannot be used to revoke approvals granted under the EPBC Act.

The Bill is unnecessary, and will unduly limit the ability of communities to raise legitimate concerns with the Environment Minister about past decisions and take active steps to protect the matters of national environmental significance the EPBC Act is intended to safeguard. EDO urges the Senate inquiry to recommend the Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024 should not proceed.

Thank you for the opportunity to make this submission.

Please do not hesitate to contact our office should you have further enquiries.

³⁵ Tasmanian Minister for Business, Industry and Resources Eric Abetz MP, Media Release, *Supporting sustainable Tasmanian seafood into the future*, 11 September 2024, accessed at: <https://www.premier.tas.gov.au/latest-news/2024/september/supporting-sustainable-tasmanian-seafood-into-the-future>

³⁶ See, EPBC Act section 78(3), commentary in *Huon Aquaculture Group Ltd v Minister for the Environment* [2018] FCA 1011 at [221]-[222].

³⁷ The Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024, Explanatory Memorandum.