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3 May 2013

Ms Sophie Dunstone
Committee Secretary
Senate Standing Committee on Environment and Communications
Parliament House
CANBERRA ACT 2600

Dear Ms Dunstone,

Re: Question on notice from Senator McKenzie regarding “water resource”

Question

Senator McKenzie asked the following question on notice regarding the Committee’s inquiry into the *Environment Protection and Biodiversity Conservation Amendment Bill 2013*:

1. *The EPBC Act defines a ‘water resource’ as:*

(a) surface water or ground water; or

(b) a watercourse, lake, wetland or aquifer (whether or not it currently has water in it);

and includes all aspects of the water resource (including water, organisms and other components and ecosystems that contribute to the physical state and environmental value of the water resource).¹

However, the bill does not identify which water resources would be matters of national environmental significance.

Do you know which water resources would be deemed to be matters of national environmental significance? That is, water resources in which geographic locations would be MNES (for example, the Great Artesian Basin, the Murray Darling Basin)?

Answer

As in the existing nuclear action² and Commonwealth action³ triggers under Part 3 of the EPBC Act that relate generally to “the environment”, the proposed water trigger is general in application and is not delineated by reference to a particular geographic location, such as a World Heritage property that is identified on a map. Large, well-known water resources such as the Great Artesian Basin and the Murray-Darling Basin will be covered by the trigger but smaller catchments and sub-catchments within them will also be relevant to consider.

¹ See EPBC Act 1999, s 528 and Water Act 2007, s 4.

² See ss 21, 22A and 23 of the EPBC Act.

³ See s 28 of the EPBC Act.

I understand this question to be concerned about how companies⁴ affected by the new water trigger will know whether their action requires approval or not. While it goes beyond the scope of the question, I note that the application of any of the provisions of Part 3 of the EPBC Act, including the proposed new water trigger, involve the combination of several elements that must be interpreted in combination. I attach an article explaining some of the key concepts in the EPBC Act.⁵ In my view, when interpreted as a whole the proposed new water trigger is sufficiently clear and precise to enable both the Commonwealth to administer and enforce it and companies affected by it to understand the need for approval.

I would add also that, having advised many clients on the operation of the EPBC Act, from a proponent's perspective the wise course to take is "if in doubt, refer it under the Act". There is no application fee for a referral and the information required is similar to State and Territory requirements so the costs involved are marginal. Most large mining and CSG projects are already referred under the EPBC Act and they can use this process to remove any doubt about whether or not they are caught by the new trigger.

If this is not a sufficient answer to the question asked or further questions arise, please feel free to contact me for a further response.

Kind regards

Dr Chris McGrath⁶

⁴ While the new triggers apply to Commonwealth entities, in practice it is mining and CSG companies who are subject to the new triggers.

⁵ McGrath C, "Key concepts of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*" (2005) 22 *Environmental and Planning Law Journal* 20-39. While this article was written in 2005 and there have been amendments made to the EPBC Act since it was written, the core concepts discussed remain materially unchanged.

⁶ I do not request that this answer be kept confidential and I consent to it being published.

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Ms Sophie Dunstone
Committee Secretary
Senate Standing Committee on Environment and Communications
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Dear Ms Dunstone,

Re: Question on notice from Senator McKenzie regarding application of the proposed water trigger to other industries

Question

Senator McKenzie asked the following question on notice regarding the Committee's inquiry into the *Environment Protection and Biodiversity Conservation Amendment Bill 2013*:

1. *Do you see the water trigger applying to other industries such as agriculture?*

Answer

The Bill proposes to limit the water trigger in ss 24D and 24E to actions involving coal seam gas development or large coal mining development. Consequently, it will not apply to other industries such as agriculture. Those other industries are, however, already subject to the other triggers under the EPBC Act, such as actions having a significant impact on a World Heritage property,¹ Ramsar wetlands² or listed threatened species.³

If this is not a sufficient answer to the question asked, please feel free to contact me.

Kind regards

Dr Chris McGrath⁴

¹ See, e.g. *Booth v Bosworth* (2001) 114 FCR 39; 117 LGERA 168; [2001] FCA 1453 (the Flying Fox Case), in which Branson J granted an injunction under the EPBC Act restraining two fruit farmers from electrocuting thousands of flying foxes on a property adjacent to the Wet Tropics World Heritage Area.

² See, e.g. *Minister for Environment and Heritage v Greentree (No 3)* [2004] FCA 1317, in which Sackville J granted an injunction, rehabilitation order and pecuniary penalties totalling \$450,000 under the EPBC Act against a farmer and his company for clearing and ploughing 100 hectares of a Ramsar wetland for the planting of a wheat crop.

³ See, e.g. *Minister for Environment Heritage and the Arts v Lamattina* [2009] FCA 753, in which Mansfield J imposed a pecuniary penalty of \$220,000 on a farmer who contravened s 18 by clearing native vegetation that was the habitat of a listed threatened species, the South-eastern Red-tailed Black Cockatoo.

⁴ I do not request that this answer be kept confidential and I consent to it being published.