

Statement of Reasons for the decision to vary and add to the conditions of approval for the Bell Bay Pulp Mill Project under the *Environment Protection and Biodiversity Conservation Act 1999*

I, PETER ROBERT GARRETT Minister for the Environment, Heritage and the Arts provide the following statement of reasons for my decision of 5 January 2009, under section 143(1)(c)(i) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), to vary and add to the conditions of the approval decision for the proposed action by Gunns Limited to construct and operate a bleached Kraft pulp Mill at Bell Bay, Tasmania, and associated infrastructure (EPBC 2007/3385).

Background

1. The proposed action is to construct and operate a bleached Kraft pulp mill and associated infrastructure, at Bell Bay, Tasmania.
2. On 4 October 2007 the then Minister for the Environment and Water Resources approved the proposed action by Gunns Limited.
3. The approval has effect for the following controlling provisions in Division 1 of Part 3 of the EPBC Act:
 - Listed threatened species and communities (sections 18 and 18A)
 - Listed migratory species (sections 20 and 20A)
 - Commonwealth marine areas (sections 23 and 24A).
4. Forty-eight conditions were attached to the approval.
5. During the process of developing the EIMP my Department had discussions with Gunns Ltd and the IEG regarding the implementation of Condition 32 of the approval. These discussions included the potential adverse outcomes from enforcing the requirement for the mill to cease operation if any of the maximum limits specified in the condition were exceeded.
6. On 10 December 2008, my Department contacted Gunns to discuss the possible addition of a new condition to the approval to stipulate that exceeding the maximum limits of effluent concentration in condition 32 will constitute a breach of the approval conditions.
7. On 15 December, my Department contacted Gunns to advise them to write to me in regard to the proposed variation.
8. On 16 December, I received a letter from Gunns consenting to a variation to the approval in the form of an additional condition.

9. On 17 December 2008, my Department provided a brief for my consideration regarding approval of the proposed variation and addition.

10. The brief provided for my consideration proposed that I add a new condition to provide that any exceedance of maximum limits provided in the conditions or in the EIMP will be a breach of conditions and thus be subject to the range of sanctions available under the EPBC Act. The brief also set out the view of the IEG in support of the Gunns proposal that the mill need not shut down under certain limited circumstances.

11. On 5 January 2009 I added new condition 43A to the approval and varied condition 32, and wrote to Gunns Ltd to, among other things, advise of these changes.

Addition to conditions

The new condition 43A makes it a breach of the approval conditions if maximum limits are exceeded.

Variation to condition 32

The variation to condition 32 makes it subject to the EIMP. This enables the EIMP to detail certain limited circumstances under which the mill would not have to cease to operate if the maximum limits specified in condition 32 or EIMP are exceeded. In these circumstances penalties for the exceedance could then be applied under the EPBC Act for breach of condition 43A.

Evidence or other material on which my findings were based

12. The evidence or other material upon which my findings were based is listed below:
 - A brief dated 17 December 2008 from my Department including the following attachments:
 - A letter from Mr Calton Frame, Gunns Limited, of 16 December 2008 to me requesting a variation to the approval by adding a new condition that it would be a breach of approval conditions if Gunns exceeded a relevant maximum limit for effluent concentrations in Condition 32 or in the EIMP;
 - A draft instrument of variation, to vary and add to the conditions of approval; and
 - A letter to me dated 17 December 2008 from the Independent Expert Group (IEG) relevantly relating to the variations.

Findings on material questions of fact*Addition to conditions*

13. Before the addition of new condition 43A, the conditions of approval did not prohibit the pulp mill from exceeding the maximum limits set out in condition 32 or in the EIMP.
14. In their letter to me dated 17 December 2008, the IEG stated that their concern over Gunns' strategy in response to exceedance of maximum effluent concentration limits set out in the EIMP Module L, would be alleviated by the addition of a condition which specifies breach of the approval if maximum limits were exceeded.
15. I also considered that it would be unacceptable if Gunns were allowed to exceed the maximum environmental limits in the conditions and EIMP without sanction. Accordingly, I decided that an additional condition was necessary to subject Gunns to potential penalties under the EPBC Act should a maximum limit be breached.

Variation to condition 32

16. Condition 32 of the conditions of approval provided that, if the maximum effluent concentration limits in condition 32 are exceeded, the mill must cease to operate.
17. In their letter to me dated 17 December 2008, the IEG noted that if the mill is required to stop operating there would be a range of complex operational issues for Gunns to address prior to start-up to ensure that the mill would not again breach maximum limits upon recommencing operation.
18. Having regard to the matters raised in the IEG's letter the Department advised me that potentially shutting down the mill and restarting it could itself lead to higher impacts on the relevant matters of national environmental significance, than if the mill were permitted to continue operation, in circumstances where the cause of an exceedance of maximum limits had otherwise been identified and rectified.

Gunns' agreement to the variation and addition

19. Gunns agreed to the addition of a new condition (after discussions with my Department), and communicated this to me in writing on 16 December 2008.
20. Gunns proposed in Module L (submitted to me on 17 December 2008), to include response strategies which meant that the mill need not shut down under certain limited circumstances. This would be made compliant with the conditions by the variation to Condition 32 which made the mill shut-down provision subject to the EIMP.

Reasons for Decision

In light of my findings above, I am satisfied that the conditions attached to the approval after the variation and addition, are necessary or convenient to protect the matters protected by the provisions of Part 3 of the EPBC Act for which the approval has effect.



PETER GARRETT
18/2/2009

Legislation

Section 133 of the EPBC Act relevantly provides:

Approval

- (1) After receiving an Assessment Report relating to a controlled action, or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person.

Section 134 of the EPBC Act provides:

Generally

- (1) The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:
 - (a) protecting a matter protected by a provision of Part 3 for which the approval has effect (whether or not the protection is protection from the action); or
 - (b) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage has been, will be or is likely to be caused by the action).

Conditions to protect matters from the approved action

- (2) The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:
 - (a) protecting from the action any matter protected by a provision of Part 3 for which the approval has effect; or
 - (b) repairing or mitigating damage that may or will be, or has been, caused by the action to any matter protected by a provision of Part 3 for which the approval has effect.

This subsection does not limit subsection (1).

Examples of kinds of conditions that may be attached

- (3) The conditions that may be attached to an approval include:
 - (aa) conditions requiring specified activities to be undertaken for:
 - (i) protecting a matter protected by a provision of Part 3 for which the approval has effect (whether or not the protection is protection from the action); or
 - (ii) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage may or will be, or has been, caused by the action); and
 - (e) conditions requiring the preparation, submission for approval by the Minister, and implementation of a plan for managing the impacts of the approved action on a matter protected by a provision of Part 3 for which the approval has effect such as a plan for conserving habitat of a species or ecological community;

Section 143 of the EPBC Act relevantly provides:

Variation of conditions attached to approval

- (1) The Minister may, by written instrument, revoke, vary or add to any conditions (other than the condition referred to in subsection 134 (1A)) attached to an approval under this Part of an action if:
- (a) any condition attached to the approval has been contravened;
 - or
 - (b) both of the following conditions are satisfied:
 - (i) the action has had a significant impact that was not identified in assessing the action on any matter protected by a provision of part 3 for which the approval has effect, or the Minister believes the action will have such an impact;
 - (ii) the Minister believes it is necessary to revoke, vary or add a condition to protect the matter from the impact; or
 - (ba) all of the following conditions are satisfied:
 - (i) the action has had a significant impact on a matter protected by a provision of Part 3 for which the approval has effect, or the Minister believes the action will have such an impact;
 - (ii) the Minister is satisfied that the impact is substantially greater than the impact that was identified in assessing the action;
 - (iii) the Minister believes it is necessary to revoke, vary or add a condition to protect the matter from the impact; or
 - (c) the holder of the approval agrees to the proposed revocation, variation or addition, or the Minister has extended the period for which the approval has effect under section 145D, and the Minister is satisfied that any conditions attached to the approval after the proposed revocation, variation or addition are necessary or convenient for:
 - (i) protecting a matter protected by any provision of Part 3 for which the approval has effect: or
 - (ii) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage has been, will be or is likely to be caused by the action).
- (2) The Minister may, by written instrument, revoke any condition (other than the condition referred to in subsection 134(1A)) attached to an approval under this Part of an action if the Minister is satisfied that the condition is not needed to protect any matter protected by a provision of part 3 for which the approval has effect.
- (3) In deciding whether or not to revoke, vary or add to any conditions attached to the approval of the taking of an action by a person, the Minister may have regard to:
- (a) the person's history in relation to environmental matters; and
 - (b) if the person is a body corporate - the history of its executive officers in relation to environmental matters; and
 - (c) if the person is body corporate that is a subsidiary of another body or company (the **parent body**) - the history in relation to environmental matters of the parent body and its executive.
- (4) The revocation, variation or addition takes effect on the day specified in the instrument. The Minister must not specify a day earlier than the day the instrument is made.
- (5) As soon as possible after making the instrument, the Minister must:
- (a) give a copy of it to the holder of the approval; and
 - (b) publish the instrument in accordance with the regulations.

Note: If the holder is not satisfied with the changed conditions attached to the approval of the holder's action, he or she can ask the Minister to reverse the change by making another change to the conditions under this section.

- (6) However, the Minister must not publish so much of the instrument as:
- (a) is an exempt document under the *Freedom of Information Act 1982* on the grounds of commercial confidence; or
 - (b) the Minister believes it is in the national interest not to publish.

The Minister may consider the defence or security of the Commonwealth when determining what is in the national interest. This does not limit the matters the Minister may consider.