



Hunter Bird Observers Club Inc.

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The Secretariat,
Independent Review of the EPBC Act 1999
GPO Box 787
Canberra ACT 2601
Australia

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Dear Secretariat,

The Hunter Bird Observers Club is sending you our submission to the independent review of the Environment Protection and Biodiversity Conservation (EPBC) Act 1999.

Summary

The Hunter Bird Observers Club (HBOC) is actively involved in the study and conservation of birds and their habitats in the Hunter region. This submission relates to HBOC's experience with respect to the effectiveness of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) in the Hunter region.

The overall conclusion is that despite its excellent objectives the EPBC Act has been ineffective in providing protection to bird populations and their habitats which continue to show ongoing decline. In the Hunter region many of the cases referred for assessment under the Act involve the Hunter River Estuary and the few remaining tracts of mature woodland on the valley floor. These are the critical habitats for migratory shorebirds and threatened species which are specifically targeted for protection by the Act. However EPBC Act determinations for these cases were invariably considered to have insufficient National Environmental Significance (NES) to warrant either rejection, or the attachment of controlled action consent conditions which substantially change the project scope.

In this submission HBOC puts forward a compelling case for greater environmental protection for the birds, their habitat and by implication the biodiversity of the Hunter region. A number of ways in which the EPBC Act and its implementation could be altered to meet this need are proposed.

HBOC is associated with and supports Birds Australia's submission to this review which deals with the generic issues concerning the protection of bird populations and their habitats.

Hunter Bird Observers Club

HBOC is a community group based in Newcastle with a focus on the Hunter Valley region of NSW. The aims of the Club are:

- To encourage and further the study and conservation of Australian birds and their habitat
- To encourage bird observing as a leisure time activity

HBOC recognizes the need for sustainable development in the Hunter region. The EPBC Act provides a mechanism for the protection of the environment during the development assessment process. To further factually based environmental decisions HBOC, has proactively undertaken long term systematic surveys of migratory shorebirds, wildfowl and terrestrial birds in the Hunter region. It is recognized as the local authority on bird populations.

The Hunter Region

The Hunter region is an area of high bird diversity with 424 species recorded to date, which is at the peak of avian diversity in Australia. As birds occupy a position at the top of the food chain the Hunter region is clearly an area of extremely high biodiversity.

Aspects of the Hunter region bird populations and habitats which are specifically relevant to the EPBC Act because of their international and national importance include:

- Migratory species protected by international agreements (e.g. shorebirds)
- Ramsar listed wetlands
- Threatened species (e.g. Regent Honeyeater *Anthochaera phrygia*, Swift Parrot *Lathamus discolor* and Australian Painted Snipe *Rostratula australis*)

During the past decade the combination of abundant coal deposits, deep water port facilities at Newcastle and a spectacular increase in global demand for coal have resulted in many proposed development projects. New and expanded mines proposals have created infrastructure bottlenecks associated with transporting coal to and through the port (e.g. inadequate ship loading capacity). In addition, following the closure of steel making and zinc smelting capacity at Newcastle the local community faced changes in its historical employment base. Consequently the NSW government has actively attempted to create new initiatives generically termed “Port-Related Industries”. This has created a conflict of land use given that the Hunter Estuary hosts the most numerous and diverse population of migratory shorebirds in NSW, Ramsar listed wetlands and threatened species of birds. Future plans for the region involve substantial population growth which with their associated infrastructure will further exacerbate conflicts of land use, particularly in remnant woodland areas.

How effective has the EPBC Act been in the Hunter Region?

The discussion paper concerning the review of the Act states that the review must consider the extent to which the objects of the Act have been achieved. These objects as set out in section 3 of the Act include:

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of National Environmental Significance (NES);
- (b) to promote Ecologically Sustainable Development (ESD) through the conservation and ecologically sustainable use of natural resources;
- (c) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous people;
- (d) to assist in the co-operative implementation of Australia’s international environmental responsibilities.

From a macro perspective the present state of the environment in the Hunter region with relation to bird populations and their habitat can be summarised as follows:

- (a) Migratory shorebird numbers continue to decline, especially the smaller species.
- (b) There has been a net loss of critical habitat for these species and most attempts at compensation for habitat loss have failed.

- (c) Port-related industrial developments in progress pose a threat to the wise management of the Ramsar wetlands, in most instances overriding local environmental planning and without public consultation.
- (d) Implemented urban developments encroach on wetlands without adequate buffer zones causing a decrease in water bird numbers and diversity. Forward planning indicates further developments which will exacerbate this trend.
- (e) New mines, industrial zones and townships threaten the remaining areas of mature lowland woodland which is important to threatened species like the Swift Parrot and Regent Honeyeater.
- (f) Bird habitat is being devoured by open cut coal mines at a rate which exceeds re-vegetation, which also causes visual pollution of the landscape.

On the above basis the EPBC Act has not delivered the level of protection of the environment expected by the HBOC members. In making this statement it is appreciated that not all the above issues fall within the present definitions of the Act or within the jurisdiction of the Australian Government under the Act. However, in its broadest objective the Act sets out to protect the environment and its biodiversity. In our judgment it has failed.

However the Act has had positive impact at the micro or individual project scale with the corporate sector increasingly aware of their environmental obligations and interacting with a community which is more informed on environmental issues and with increased expectations that development must be sustainable. HBOC's positive experiences of engagement by developers suggest that the corporate sector wishes to see its environmental expenditure having outcomes which make a meaningful contribution to environmental improvement as opposed to complying with token or ineffective consent conditions. Despite these positive comments on the contribution of the EPBC Act to nurturing a culture of environmental awareness, both the corporate sector and the community are frustrated by the assessment and regulation process. The cynical view is that it has created an expensive industry of environmental consultancy and regulation that often fails to deliver the best and most cost effective outcome for the environment (i.e. the effort goes into researching and debating issues rather than protecting the environment).

Economic Factors

The discussion paper indicates that the Minister in implementing the EPBC Act will be guided by key Australian Government policy objectives which included:

- (e) "to ensure activities under the Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives in accordance with the Expenditure Review Principles".

In addition, with respect to matters of NES, it is stated that:

"The Minister may also exempt actions from the requirements for assessment and approval under the Act, in particular where the Minister is satisfied that it is in the national interest to do so."

Since the introduction of the EPBC Act, Australia has experienced a decade of economic prosperity and unprecedented demand for its resources. In the Hunter region this is exemplified by the generation of numerous new coal mining projects, including related infrastructure expansion. In the previous section HBOC expressed its concern that these projects might exacerbate existing adverse trends in the bird populations, their habitat and the biodiversity of the region. Our position is that the projects should proceed only if sufficiently profitability to support implementation and operation in an environmentally sustainable manner.

The recent economic down turn will inevitably make many projects entering the implementation stage less profitable. HBOC is opposed to any weakening of consent conditions in order to increase profit margins and provide additional “economic stimulus”. Where possible projects which are marginal should be stalled until there is a return to levels of demand and profitability which can afford environmentally sustainable operation. Future projects should not be bought by consenting to lower environmental standards. In summary we consider it important that the Minister does not allow weakening environmental standards as a consequence of the current economic conditions.

Scope of HBOC’s Submission

HBOC’s experience relates primarily to development projects in the Hunter region involving birds and bird habitat. It is aware that its experiences are similar to those of other groups interested in birds and their conservation throughout Australia. Birds Australia is submitting a comprehensive submission dealing with the generic issues experienced by these groups. HBOC supports and wishes to be associated with the Birds Australia submission. The present submission will be limited to its experience of the EPBC Act in the Hunter region. In doing so we draw upon some developments assessed outside the EPBC Act, an approach justified by our belief that related projects have to be assessed collectively to understand their cumulative impact on the bird related aspects of ESD in the Hunter region.

Detailed Discussion of HBOC’s Experience of the EPBC Act

In the following sections possible reasons for the perceived gap in the effectiveness of the Act between the macro (landscape scale) and micro (project) scales is discussed. In addition a number of examples of difficulties and frustrations experienced at the project assessment and implementation level are outlined with reference to specific examples which relate to questions raised in the review discussion paper.

Failure to protect the Environment at the Macro Scale

In the above discussion it was indicated that the Hunter region is endowed with exceptionally high bird diversity by Australian standards which implies that the region is of high biodiversity. Against this background it is surprising that in numerous determinations under the Act very few matters of NES have been identified. This is disturbing because the objectives of the Act include the intent to protect threatened bird species and biodiversity. One possible explanation of this situation is that present definitions of NES require broadening and this is discussed in a subsequent section. Another possibility is that associated development projects are being split up so that their full cumulative impact is not apparent during assessment as discussed in more detail in a later section.

However probably the greatest contribution to the failure of the Act to address adverse environmental trends, is that development projects are being generated on an ad hoc basis without an overriding strategic planning framework to ensure delivery of ESD. This is discussed in the next section.

Ecologically Sustainable Development

HBOC’s position is that the conservation of the environment and biodiversity should be a core consideration in planning for the region. Put simply, development projects should be zoned in a manner which minimises their environmental impact; i.e. where possible they should be fitted round existing landscape features of high environmental value, thus preventing the need to compensate for critical habitat degradation and loss. In the case of birds in the Hunter region critical environmental features are estuarine habitats, wetlands and remnant mature woodland on the Hunter Valley floor. Unfortunately, developers and planners see these areas as low value and sometimes unsightly real estate providing a prime opportunity for development. The Draft Lower Hunter Regional Strategy 2005 (LHRS) issued by the NSW Department of Planning conveniently did not include a regional

conservation plan, but foreshadowed the intent to “ensure the protection of biodiversity through a Regional Conservation Plan”. (NSW Department of Planning 2005 p.7). A draft Lower Hunter Regional Conservation Plan was issued in October 2006 by the NSW Department of Environment and Conservation which states on p. 17:

“Areas of high biodiversity value and other planning constraints were considered by the Department of Planning when identifying the proposed development areas for the LHRS. However, in some areas, it was determined that social and economic considerations outweigh biodiversity considerations and, as a result, some of the proposed development areas include high conservation values. In addition, previous land use decisions have resulted in areas of high biodiversity value being zoned for development.”

HBOC has at every opportunity contributed to reviews and strategic planning initiatives at the local, regional and state government level. Examples include:

- The Austeel Mill EPBC 2001/231
- The Newcastle Port Environs Concept Proposal, June 2003
- The Lower Hunter Regional Strategy in 2003
- The Extension of Shipping Channels, Port of Newcastle EPBC 2003/950
- The Anvil Hill Open Cut Mine Project, EPBC 2007/3228
- The Newstan Awaba Open Cut Mine Extension in 2006
- The Newcastle Coal and Infrastructure Group (NCIG), Coal Export Terminal EPBC 2006/2987
- The Redlake Enterprises Project, Tomago EPBC 2007/3343
- The QRNational Hexham Redevelopment Project in 2008.
- Hunter Economic Zone, Kurri Kurri EPBC 2004/1417
- Hunter Economic Zone Nominees Pelaw Main By-pass 2007/3891

At the state level our experience is that the process lacks transparency. In the worst cases submissions are not acknowledged and outcomes are not communicated. We believe there are high level strategic plans for development of the area but we are not party to their details or given any opportunity to comment during the formative stage.

In the Hunter Estuary the need for transport and infrastructure corridors to the port is self evident. However the manner in which the NSW government has attempted to establish Port-Related Industries and plan its transport and infrastructure corridors does not suggest that ESD is a consideration. Some specific examples follow:

- (a) The Tomago Buffer Lands (buffer land between the Tomago Aluminium Smelter and Kooragang Nature Reserve Ramsar Site) earmarked for wetland rehabilitation under the management of Kooragang Wetland Rehabilitation Project (KWRP) in 1994 was acquired in 2003 by the NSW State Government for the Austeel Mill Project. The Protech Steel Project on Cormorant Road Kooragang Island included the area known as “Big Pond”. Both these projects which were economically unsound and were eventually abandoned resulted in a net loss of environmentally important wetlands including migratory shorebird habitat.
- (b) SEPP No.74 – Newcastle Port and Employment Lands legislation was passed in August 2003. It included the above mentioned Tomago Buffer Lands and a corridor of land through the KWRP on Ash Island and adjacent to the Kooragang Nature Reserve Ramsar site (KNR). The purpose was to provide an infrastructure corridor from the port area on the South Arm of the Hunter River to the proposed Austeel site at Tomago on the North Arm of the Hunter River. This action was taken during an active community consultation process but there was no consultation on the SEPP No. 74 legislation. Subsequent to the failure of the Austeel project the SEPP No. 74 legislation was not revoked but was eventually re-designated SEPP Major

Projects. The SEPP Major Projects land contains wetland habitat of importance to migratory shorebirds, the Painted Snipe, and other species listed under the NSW Threatened Species Conservation Act 1995. Since designation of the land under the SEPP No. 74 legislation minimal maintenance has occurred and its environmental values have degraded either through lack of diligence or possibly as a deliberate strategy to diminish its environmental significance.

- (c) A new project the NCIG coal export terminal has been found for the area of the Protech site and this has recently passed into the implementation stage. The NSW government provided \$1.24 million compensation for the loss of the Big Pond habitat which was critical for the smaller species of migratory shorebirds, the group of waders which have shown the most extensive long term decline in the Hunter Estuary. This compensation package has failed to provide alternative habitat for the smaller wader species which highlights the high risk nature of the compensation strategy. This will be discussed in more detail in a subsequent section. The Big Pond site was dormant and starved of water over a 12 year period between 1996 and the implementation of the NCIG project in 2008 during which time it could have been maintained to support the smaller migratory shorebird species until proven compensatory habitat was provided. A letter from the Minister for Public Works and Services to HBOC dated 21 January, 1998 promises investigation of the possibility of creating another artificial pond elsewhere on the island. From an ESD perspective it can be argued that coal export facilities at Newcastle could have been initially expanded by de-bottlenecking and then expanding the existing coal loading facilities operated by Port Waratah Coal Services. This would have allowed the approval of the new NCIG coal export terminal to be delayed until it was proven absolutely necessary. This approach would at least initially have decreased the environmental footprint associated with increased coal export. Apparently the political will to ensure competition in the provision of coal export services exceeded consideration of ESD.

HBOC's position is that component Port-Related Industries should be established in the Hunter Estuary only if there is a compelling case that this is the most appropriate location. Projects should not be justified merely as a short term measure to provide employment. Sustainable principles for selecting sites for the new heavy manufacturing activities like steel making and base metals smelting should be based on the minimum energy case for conversion of ore in the ground to a marketable end product. It is also important to consider the disposal of wastes generated during processing like slag and iron rich residues containing jarosite compounds. Historical manufacturing activities in the Hunter Estuary have left a legacy of pollution stemming from residue disposal which requires expensive remediation and restoration and perpetual monitoring (BHP Billiton's Hunter River Remediation Project 2008). New industries established in the Port complex should not generate wastes requiring local disposal and thus alienating further environmental land in the Estuary. Arguments for any industry of this type in the Hunter Estuary must be weighed against alternative options such as mine site processing.

Similarly the impact of new townships which cause declines in bird populations by consuming the remaining large scale tracts of mature lowland woodland, further fragmenting remnant bushland patches and encroaching on wetlands should be evaluated against development at alternative locations. It is important to understand the cost of protecting the environment. Unfortunately within NSW a number of powerful developers have acquired land opportunistically and have actively lobbied to ensure development takes place at their preferred locations, despite the fact that they were shown to be inappropriate from a strategic planning perspective, e.g. Huntlee New Town Development, North Rothbury EPBC 2007/3557. These vested interests have blatantly attempted to buy political influence through donations to campaign funds of specific State Government candidates which they openly acknowledge is for the purpose of obtaining access to decision makers. This was exemplified on ABC Television when a Hardie Holdings representative admitted that political donations were "the way things are done in the development industry". Statements have also been made in public that where people live in the future should not be dictated by environmental considerations. Proposed

developments like Huntlee New Town suggest that such tactics are successful. Clearly ESD is not part of their agenda. In addition, at the conceptual stage the planning process lacks the attributes of community engagement and transparency which the EPBC Act seeks to engender. There are very important matters of NES at this site, such as Swift Parrots and the plant species *Persoonia pauciflora* which is Critically Endangered and occurs nowhere else.

Ramsar Wetlands

A key objective of the EPBC Act is to assist in the co-operative implementation of Australia's environmental responsibilities. The KNR is a Ramsar site situated at the heart of the Hunter Estuary. Listing of this site was primarily based on its importance to migratory shorebirds, the protection of which is also an international responsibility. The survival of migratory shorebirds in the Hunter Estuary depends on areas outside the Ramsar site when the overall requirements for foraging and roosting are taken into account. The listing of a Ramsar sites places an obligation on the wise management of the surrounding environment. For instance the survival of migratory shorebirds is enhanced by preventing disturbance at roost sites and by minimizing the distance travelled between roosts and foraging sites. The proposed Redlake Enterprises Project at Tomago, EPBC 2007/3343 intends to fill in 22 hectares of saltmarsh immediately adjacent to the KNR which is not consistent with the wise use of wetlands, the principle underpinning the Ramsar Convention.

The NSW State Government approach to the development of Port-Related Industries in the Hunter Estuary does not constitute wise management of the area surrounding the KNR. For instance the SEPP No. 74 subsequently named SEPP Major Projects quarantines land immediately adjacent to the Ramsar site which contains arguably the most important habitat for a number of the smaller migratory shorebird species which have already suffered habitat loss from the acquisition of Big Pond. Migratory shorebirds are experiencing threats throughout the East Asian-Australasian Flyway (EAAF) and Australia must be transparently meeting its own obligations if it is to be influential in arguing the case for development curbs with China and South Korea involving migratory shorebird habitat in the Yellow Sea.

Cumulative Impacts

In the previous sections it was suggested that the full impact of development programs were not being adequately assessed because they were being considered individually rather than as an integral part of an overall strategic planning framework. In the Hunter region the expansion of export capacity for coal is an excellent example. From the regional perspective it may be argued that approving new mine capacity e.g. Anvil Hill Open Cut Mine and other mines in the Hunter Valley, independently from associated infrastructure projects transporting coal to and through the Port of Newcastle does not consider the cumulative impact of an expansion of coal capacity in a transparent manner. Indeed when component projects are evaluated sequentially consent for one project may prejudice decisions on subsequent projects. I.e. if approved, new mine capacity exceeds transport capacity the consent for requisite infrastructure projects may become inevitable even if there are serious environmental issues under the EPBC Act.

In the above example the infrastructure expansion at the Port of Newcastle was handled as suite of associated sub-projects conveniently split between accountable corporations. (The NCIG Coal Export Terminal, the dredging involved in the Extension of the Shipping Channels, Port of New Newcastle Project, The BHP Billiton Hunter River Remediation Project and the Hexham Redevelopment Project by QRNational to construct a Train Support Facility (TSF)). All of these projects have the potential to impact adversely in an interactive manner on the Hunter Wetlands. For instance these projects compete for land use with migratory shorebird and threatened species habitat. In the case of dredging, altering the tidal prism in the Estuary has the potential to cause flooding of the existing specialized bird habitat e.g. limited areas of SEPP 14 samphire habitat, and to cause degradation by the encroachment of mangroves throughout the Estuary. The land chosen for the proposed TSF will

necessitate the filling of similarly important SEPP 14 wetlands on Hexham Swamp. Setting consent conditions including off-sets for these individual projects without considering their cumulative impact is an extremely limited approach which does not give the community confidence that the environmental values of the Hunter Estuary are being protected.

Under section 146 of the EPBC Act the Australian Government Environment Minister may agree to conduct a “strategic assessment” of potential actions under a policy, program or plan. These may include but not be limited to:

- regional-scale development plans and policies
- district structure plans
- local environmental plans
- large-scale industrial development
- fire, vegetation or pest management policies, plans or programs
- water extraction/use policies

A strategic assessment happens early in the assessment process and is separate to the conventional/referral/assessment/approval process under the EPBC Act. A strategic assessment may examine the potential cumulative impacts of actions which in accordance with one or more policy, program or plan.

The existence of section 146 acknowledges the need for a strategic approach to the assessment of large scale development programs. Failure to assess the proposed increase in coal production and export in the Hunter region under section 146 in order to understand its cumulative impacts is an example of failure to implement the EPBC Act to maximum effect.

Insufficient National Environmental Significance

Very few of the listed nationally threatened bird species occur in the Hunter region. Those terrestrial species found regularly, Regent Honeyeater, Swift Parrot and Australian Painted Snipe collectively share some of the following characteristics; nomadic (Regent Honeyeater and Swift Parrot, the latter although migratory to and from breeding grounds is fairly nomadic in its winter-foraging range), difficult to detect because of cryptic plumage, skulking behaviour (Australian Painted Snipe) and in the case of the Australian Painted Snipe, no known calls. Environmental assessments for applications are often based on short-term survey effort and field studies which will not determine the true significance of a development site to these threatened species. An example is the Regent Honeyeater, which like the Swift Parrot, favours different locations over a cycle of years (e.g. up to seven) determined by local conditions.

In late 2007 the Regent Honeyeater bred at a woodland site previously assessed and rezoned to accommodate a large-scale industrial complex, Hunter Economic Zone (HEZ). This breeding event was particularly important as the species was not recorded breeding at its usual core breeding locations and there was an unusually high ratio of fledged birds to nestlings as well. The same site was deemed by the Swift Parrot Recovery coordinator as “one of the most important foraging sites for Swift Parrots in NSW” (Saunders 2002). Therefore this one site has been recognised as being highly significant for a nationally listed endangered bird species whilst having supported a crucial breeding event for another. In cases where the habitat is considered suitable for threatened species and there are known limitations with the field surveys it is important that the precautionary principle is applied.

It is extremely difficult to support a case for preservation of habitat based on the bird species diversity of the region. For instance, the HEZ site which was approved for development is arguably the most diverse and significant site for woodland birds in the Hunter Valley and as such the most important reservoir for these species which are experiencing widespread decline (Olsen 2008). Consequently given that all the large sized remnant lowland woodland patches are under threat approval of projects

like HEZ threatened long term regional bird diversity and by implication the underlying biodiversity of the food chain.

Assessment of NES places great emphasis on threatened species rather than addressing the broader objectives of the EPBC Act; namely protecting ecological communities and biodiversity which are more difficult to quantify. This is a serious shortcoming of the assessment process. For instance as is discussed throughout this submission the Hunter region is at the peak of avian biodiversity in Australia. Unfortunately many determinations made under the Act suggest there is insufficient NES even when the areas concerned are known to be important bird areas and host threatened species. Quite apart from this conclusion being questionable against the broader intent of the Act the wording “insufficient NES” has the unfortunate connotation of suggesting to developers and regulators that there is no need for conservation.

Referral to NSW State Government for assessment

All of the Hunter region cases considered under the EPBC Act have been referred to the NSW State Government for assessment and implementation. In some cases the Commonwealth Government places conditions on the referral in terms of a requirement that a project proceed in a Particular Manner (e.g. NCIG Coal Export Terminal). This strategy essentially prescribes some conditions of consent which must be placed on the project if it is approved by the State Government. However HBOC considers that the Commonwealth Government should take greater control of projects. For instance the NSW State Government is often the de facto proponent of projects (e.g. the Newcastle Port-Related Industries). Under these circumstances it is unlikely that a project will be rejected on environmental grounds. Indeed experience in the Hunter Estuary is that development comes first with the use of facilitation strategies such as the Part 3A legislation declaring projects to be of State Significance or the site is declared to be a State Significant Site (Hexham Redevelopment Project) and introducing legislation which over-rides local environmental planning and zoning regulations to smooth passage through the assessment process. When this occurs the NSW Department of Environment and Climate Change (DECC), which may be reviewing an assessment, is relegated to an advisory role and power lies with the Department of Planning. The Minister for Planning is able to exempt actions and give consent to projects at his discretion without having recourse to scientific evidence. The environment is relegated to secondary consideration and is accommodated by compensation through off-sets which as demonstrated below is a high risk strategy. Having encouraged and provided incentives to developers the State Government is unlikely to reject a project for instance by exercising the precautionary principle. We point out that there is no evidence of environmental assessment ahead of declaring projects of state significance and introducing legislation like SEPP No. 74, subsequently revised to SEPP Major Projects.

Compensatory Off-sets

As discussed previously the NSW State Government regularly uses the strategy of approving projects subject to the provision of off-sets as compensation for any adverse environmental impact. HBOC considers that this approach should be a last resort because it assumes that off-sets will successfully replace critical bird habitat. For example replacement of the Big Pond migratory shorebird habitat is still unresolved after twelve years. It can be argued that there are no areas of replacement habitat available and the creation of new habitat is unproven technology. To date the \$1.24 million compensation provided to create replacement habitat for the loss of the Big Pond has been expended on a number of initiatives including the ill-advised construction of five roost platforms for migratory shorebirds adjacent to their foraging grounds in Fullerton Cove. These platforms have been a failure and underpin the flawed nature of the compensation strategy. Compensation money was also expended on a feasibility study to create an artificial tidally flushed pond on Ash Island. However after community consultation this initiative was abandoned because the area designated was found to be critical habitat for the resident Eastern Grass Owl *Tyto longimembris*, listed as Vulnerable under the

NSW Threatened Species Conservation Act 1995. This experience supports the previous claim that there are no existing areas available for use as compensatory habitat in the Hunter Estuary.

There are a number of other difficulties with the compensatory off-sets strategy which are outlined below:

- (a) Setting short term off-set provisions with out adequate provision for long term maintenance.
- (b) Failure to set criteria for off-set success in the consent conditions which, if not met, will trigger the need for further rehabilitation.
- (c) Off-sets must provide real compensation to the environment based on the principle of no net loss of critical habitat or degradation of existing habitat. Providing infrastructure for general community recreational benefit including bird viewing platforms (example discussed in a subsequent section) does not compensate for habitat loss and degradation and should not be accepted as compensation.
- (d) Where possible compensation measures should be put in place ahead rather than contemporaneously with project development. This is particularly important when the creation of compensatory habitat is involved because such measures are dynamic and take a while to reach equilibrium which is necessary in order to assess the effectiveness of the compensation measures. For instance, will compensatory habitat be suitable for migratory shorebirds when established? Consequently a commitment to providing funds to manage the rehabilitated habitat until it is fully established is also required. This may be for a number of years in some instances.

There are numerous examples which support the above points in the detailed histories of the projects which have been referenced throughout this submission.

Where there are a number of related projects as in the case of the Port-Related Industries there can be advantages in linking off-sets to an Estuary-wide plan as opposed to relating off-sets directly to specific individual projects and their impact on the environment. Unfortunately this approach is administratively complex and separates individual projects from accountability on a directly measurable cause and effect basis. However it does have the compelling advantage of attempting to address retrospectively the issues of cumulative impact and the lack of a cohesive integrated approach to ESD at the planning and project consent stages. Recently there have been moves to adopt an integrated approach to compensation including a limited amount of community consultation about priorities. HBOC experience suggests that both the corporate sector and the community wish to see the compensation money provide real benefit to the environment thus avoiding fiascos like the bird roosting platforms in Fullerton Cove. It is also important to ensure that compensatory expenditure is spent on the Hunter Estuary environment and is quarantined from use by the state government to off-set their existing obligations for expenditure on conservation.

Changing Project Scope after Approval

Original assessment of the HEZ project was based on the site supporting large-scale industrial sites with large areas of preserved vegetated buffers, allowing significant features of the mature woodland site to be retained. Subsequent to the rezoning process, current proposals at the site are for a standard small scale industrial subdivision which will entail a far greater intensity of clearing with a much greater environmental footprint destroying the ecological attributes of one of the last reservoirs of mature woodland habitat on the floor of the Hunter Valley contrary to the intent of the original basis of consent. Development consent was ultimately granted with a retention of only 10% of mature winter flowering Eucalypts – how can this be justified? There is no evidence to suggest that such a retention rate will support species that have particularly limited foraging habitat. It is clear that there was no scientific basis for this decision. Surely this is the quintessential example of the Act failing to deliver ESD. Despite the fact that the site was clearly established as being highly significant for Swift

Parrots and Regent Honeyeaters, approvals granted under the EPBC Act paved the way for clearing of 90% of the most important habitat attribute for these species in large parts of the HEZ area.

Failure to Consider Threats like Fragmentation

HEZ and Anvil Hill (now Mangoola) Open Cut Mine Project are both developments located within two of the largest remnant areas of mature woodland on the floor of the Hunter Valley. An index of trends in bird populations recently published for the Hunter-Central Rivers Catchment of NSW demonstrates a pronounced decline in species richness over the period of the drought between 2000 and 2006. (Olsen 2008, Fig. 14 p. 16). During events like the recent drought the remaining extensive areas of mature lowland woodland become the reservoirs for the survival of species which are able to repopulate the highly fragmented agricultural landscape of the Hunter Valley when conditions improve. Long term monitoring of farms with limited remnant bush has demonstrated local declines and extinctions in the Hunter region which will require repopulation if the bird diversity of the region is to be conserved. (Olsen 2008, Fig. 24 p. 23). Assessment procedures are failing to effectively consider the flow-on effect of developments which impact on the long term resilience of regional bird populations over the entire region. To maintain these refuges in the Hunter Valley, both the remnant woodlands and their connectivity to the network of smaller bush remnants must be protected. Most environmental assessments are based on short term surveys and monitoring and do not consider impacts on the surrounding landscape. If bird diversity and hence biodiversity is to be protected the precautionary principle should be applied and developments like HEZ should not be approved in areas of high ecological value (i.e. there was no compelling reason why the HEZ had to be established at the mature woodland site with known extant populations of threatened flora and fauna species when alternative sites on degraded land were available). The situation for Anvil Hill is more complex because exercise of the precautionary principle would become a decision between whether to exploit a major coal resource or protect the environment.

Fragmentation as a threatening process is not restricted to the woodland habitat but is also applicable to the estuarine habitat of migratory shorebirds. Survival of shorebirds is dependent on a network of secure roosts as close as possible to feeding grounds. Ad hoc development of projects within a complex mosaic of migratory shorebird habitat as is occurring in the Hunter Estuary can result in sub-optimal conditions for survival even if compensatory off-sets appear to prevent a net loss of habitat.

Failure to Meet Consent Conditions

Australian Rail Track Corporation's Sandgate Rail Grade Separation Project - Market Swamp section at Sandgate NSW provides an example of a failure to implement consent conditions. The presence of the listed species, Latham's Snipe *Gallinago hardwickii*, triggered the Act (2005/1948) but the project was deemed "not a controlled action". However, Latham's Snipe was recognized in the EIS as utilizing wetland habitat in the vicinity of the project and a range of compensatory actions were to be taken in consultation with recognized wetland and ecological experts to compensate and mitigate against adverse impacts on the wetland. The wetland-oriented compensatory actions did not eventuate; instead, with the approval of the NSW Planning Department, the sum of \$40,000 was given to the Hunter Wetlands Centre, Shortland for a bird viewing platform to be constructed on their site at least two kilometres away from Market Swamp. HBOC believes that this is a gross misuse of money designated for wetland improvement. It should not have been used to provide a community amenity and the NSW Department of Planning failed in its duty to ensure that consent conditions had been implemented.

Bird Survey Standards

Currently projects are being assessed by the both the Commonwealth and State governments. A variety of bird survey methods are used by environmental consultants providing supporting evidence for referrals and there are no set standards. Consequently, it is strongly recommended that uniform

surveys standards be established for use throughout Australia and that the Commonwealth Government makes it a condition that these standards are adhered to

The recently released “The State of Australia Birds 2008” (Olsen 2008) provides abundant evidence for the need for survey effort to cover not only all seasons but a number of years to understand the importance of an area to bird populations. Where an area is potentially critical habitat for threatened species the absence of long term survey data should result in exercise of the precautionary principle as discussed earlier with respect to the HEZ project. Although the definition of “critical habitat” for Regent Honeyeaters has not been defined, surely an area that supports one of the very few known breeding locations must be recognised as being such.

Conclusions

The stated objectives of the EPBC Act are excellent and provide a laudable intent to protect the environment and biodiversity an outcome of vital importance to the HBOC. Unfortunately, our experience in the Hunter region is that during the last decade the Act has failed to halt the decline in the diversity and population size of migratory shorebirds and woodland birds as well as the loss and degradation of their habitats. It has also failed to reinforce the need for the wise management of Ramsar listed sites and their buffer zones. Put bluntly the custodianship of bird populations and their habitat in the Hunter Estuary reflects badly on Australia’s commitment to its international obligations.

At every opportunity, both proactively, through public forums and submissions to enquiries and reactively by commenting on development projects at the conceptual and environmental assessment stage HBOC has attempted to provide effective and balanced advocacy for birds and their habitat. Undoubtedly this effort has provided some positive outcomes at the project level but on the macro or landscape scale the EPBC Act is not delivering its objectives. From the above detailed account of our experience of the Act a number of systemic difficulties with the process of implementation are apparent:

- All major developments referred under the EPBC Act in the Hunter Region have been approved, in some instances subject to minor modification set by Particular Manner constraints. This outcome includes projects which involve threatened species and their prime estuarine and woodland habitats on the basis that there is insufficient NES. It can only be concluded that regardless of impact, no major developments in the Hunter region are likely to be rejected or significantly modified while the Act continues to be administered in the present manner. This is a disturbing conclusion because the Hunter area is at the peak of bird diversity in Australia and this implies very high biodiversity. Viewed cynically, the tests for NES have the potential to legitimise development in environmentally sensitive areas on the basis that there is no cause for serious concern. Long term adverse trends in bird populations suggest that this is not the case and birds are indicators of a more general demise in biodiversity. **Consequently it is recommended that the definition of NES needs to be broadened to take into account the habitat needs of threatened species like the Regent Honeyeater and Swift Parrot over their life cycle. Also more use of the precautionary principle should be exercised with respect to protecting areas which have high diversity of threatened woodland species. It should be possible to develop assessment criteria for threatened bird assemblages (e.g. the smaller insectivorous passerines).**
- Projects handed back to the NSW State Government after consideration under the EPBC Act are invariably approved with environmental issues usually accommodated by a strategy of providing off-sets for habitat loss and environmental degradation. As indicated above off-sets are a high risk strategy which can fail and should be the option of last resort. Our position is that developments should be integrated in to the landscape with minimal environmental impact rather than to attempt to restructure habitat around developments. **It is recommended that all environmental assessments should discuss options for minimising environmental**

impact. Where developments are proposed in environmentally sensitive areas the environmental assessment should explain why the development cannot occur at a less sensitive location including the economic implications.

- The NSW State Government has a role to promote and attract development to the Hunter Region. Consequently it has a vested interest and in some cases is the de-facto proponent of developments. **It is recommended for this reason that the Commonwealth Government should take greater control of the assessment and implementation of development projects to ensure environmental standards are not compromised by local and political considerations.**
- **Long term strategic plans which minimise environmental impact are essential if the objective of ESD is to be achieved. It is recommended that the Minister use the power under Section 146 of the Act more proactively to undertake "strategic assessment" of proposed policies, programmes or plans. It is further recommended that additional or more specific guidelines be developed to ensure early referral of all related projects that fall into this category.** This would ensure that policies, programmes and plans are assessed for their objective of achieving ESD at an earlier stage and that the cumulative impacts of all related projects are considered. This approach would have many advantages. For instance it would largely circumvent the failure to address cumulative impacts when a number of related projects are submitted individually. It would be cost effective by implementing environmental standards and constraints at the project conceptual stage and avoiding sunk expenditure by developers on feasibility and environmental assessments of projects which will be subsequently rejected.
- The wide variation in the quality of bird survey data used to support environmental assessments is of concern given that birds are important indicators of biodiversity and use a variety of habitats depending on prevailing conditions. **It is recommended that scientifically supported survey standards should be a requirement for all assessments. Birds Australia is in a position to recommend standards based on their extensive experience in the development of survey techniques and their use for bird monitoring.**

HBOC is willing to provide further information on the points discussed in this information and data to substantiate the claims of ongoing decline in the bird populations of the Hunter Region.

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For and on behalf of Hunter Bird Observers Club

References

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