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Independent review of the EPBC Act 1999
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18 December 2008

Submission to the
**Independent Review of the *Environment Protection and
Biodiversity Conservation Act 1999***
By Ann Jelinek

*I do not want this submission to be treated as **confidential** and/or **anonymous***

This submission refers primarily to Item 2 in the Terms of Reference for this Review.

In particular, important, ongoing issues have been raised by the Auditor-General in the Australian National Audit Office -Audit Report No.38 2002–03 : Performance Audit : Referrals, Assessments and Approvals under the *Environment Protection and Biodiversity Conservation Act 1999*, particularly the sections on:

- * gaps and shortcomings in referral information,
- * lessons learnt in the first 10 years of operation of the EPBC Act, and
- * the cumulative impacts of EPBC Act approvals on threatened species and ecological communities.

Since completion of this Audit Report, these issues still have not been adequately addressed. In fact, substantially incomplete referrals that lack scientific rigor, environmental risk assessment and adequate community consultation, continue to be accepted as a basis for critical decision-making as part of the EPBC assessment and approval processes. Importantly, inaccurate decisions made in relation to ‘controlled action’ determinations are exacerbated throughout the remainder of the approval process.

My submission uses a recent project, *Melbourne Water/Water management and use/Goulburn River, to Sugarloaf Reservoir to the N/E Melbourne/VIC/Sugarloaf Water Pipeline Project: EPBC Reference Number: 2008/3960*, as a case study to illustrate important issues of concern in relation to the operation of the EPBC Act.

Case Study

Melbourne Water/Water management and use/Goulburn River, to Sugarloaf Reservoir to the N/E Melbourne/VIC/Sugarloaf Water Pipeline Project

EPBC Reference Number: 2008/3960

1. Numerous submissions, including valid, detailed claims in relation to potential significant impacts by this major infrastructure project (including all associated infrastructure like pump stations, power stations and high voltage power lines) on a significant number of Matters of National Environmental Significance (NES), were made by community groups and individuals in relation to the referral documents for this project.

However, these submissions were largely dismissed by the Commonwealth in its *Statements of Reasons for Decision on Referral and Assessment Approach*. No scientific basis was provided for excluding the identified items of NES from the Controlled Action decision.

Significantly, a Nationally Critically Endangered species has subsequently been located within the project area during environmental assessments being undertaken as the project construction progresses. This approach severely compromises opportunities and strategies to effectively protect Matters of National Environmental Significance, and the development of an overall plan for managing threats to identified significant flora, fauna and ecological communities directly, indirectly and cumulatively affected by the project. **Accordingly, the approach taken in relation to this particular project is contrary to the intent and requirements of the EPBC for Matters of National Environmental Significance which should be determined as an integral part of the completed environmental impact assessment and approval processes prior to any commencement of construction activities.**

Also, the Precautionary Principle was not applied, even given the high probability of Matters of NES likely to be significantly affected. The EPBC guidelines for assessing potential impacts on Matters of NES states:

*When deciding whether or not a proposed action is likely to have a significant impact on a matter of national environmental significance, the precautionary principle is relevant. Accordingly, where there is a risk of **serious or irreversible** damage, a lack of scientific certainty about the potential impacts of an action will not itself justify a decision that the action is not likely to have a significant impact on a matter of national environmental significance.*

For example, the Critically Endangered, Golden Sunmoth, *Synemon plana* and the Endangered Leadbeater's Possum *Gymnobelideus leadbeateri* were excluded from the "controlled action" decision. This determination was based primarily on the Proponent's substantially incomplete Referral documentation that did not include specific surveys for these and many other EPBC listed species likely to be present in sub-optimal habitat within the project area, even though the respective species have been recorded in similar sub-optimal habitats within the bioregion. Populations of

these species, if present, could be critical to the genetic variability and hence, long term viability of local populations of these EPBC listed species.

The Advisory Committee appointed by the Victorian Government to assess presentations to the Project Impact Assessment, did not question the list of EPBC listed species included in the “controlled action”, so many EPBC listed species likely to occur have been excluded and hence, inadequately considered for this major infrastructure project, with potentially serious consequences for local populations and their respective Recovery Plans.

2. The Project Impact Assessment (PIA) approved by the Commonwealth as the accredited process for the "controlled action" decision was substantially incomplete throughout the community consultation period and the Panel Hearing process convened and reported on by the Advisory Committee. Moreover, the PIA did not relate to any formal State legislation or guidelines so the Commonwealth's support for it as the “accredited process” is of particular concern.

The PIA for the Sugarloaf Pipeline Project could only be regarded as a preliminary overview in terms of the environmental and cultural heritage assets and potential impacts. Surveys and assessments were superficial, being undertaken within extremely limited time constraints and heavily reliant on desktop studies and rapid survey techniques. Major gaps existed in field assessments of the entire project area and target surveys for threatened species likely or possible to occur within and adjoining the project area.

Importantly, the PIA did not meet the requirements of the EPBC Act in relation to addressing the “controlled action” decision. The PIA did not address specific impacts and specific mitigation strategies for each EPBC listed species based on the EPBC Guidelines for ‘*significant impact criteria*’, due to its limited threatened species selection for consideration, especially excluding detailed consideration of the Critically Endangered Golden Sun Moth, *Synemon plana* and the Endangered Leadbeater’s Possum *Gymnobelideus leadbeateri*, lack of quantifiable assessments of nationally threatened species populations that are ‘likely’ or ‘possibly’ affected, lack of assessment of the extent of impacts for each species with respect to their Recovery Plans, and lack of accountable mitigation and monitoring strategies.

Also of particular concern, is that the PIA focused on the **absolute minimal requirements considered necessary to satisfy just the EPBC Act** (and FFG Act), instead of embracing the Commonwealth’s (and Victoria’s) proactive legislation, related strategies, action plans and the IGAE, that aim to protect Australia’s unique biodiversity and cultural heritage. This direction, so clearly reflected throughout the project documentation, has seriously diminished community expectations and confidence in the current EPBC assessment and approval processes. Moreover, because of its incomplete and inadequate project impact assessment, the PIA missed excellent opportunities to constructively contribute to the implementation of relevant strategies and plans with important information about particular species and ecological communities.

3. The Environmental Management Strategy, Vegetation Net-gain and Off-set Management Plans, further threatened species surveys and plans are in progress for this major infrastructure project. However, this information has not been made publicly available, it has not been presented in a revised, completed PIA and the public has not been given the opportunity to evaluate or comment on this information.

The inadequacy of this approach was the subject of the Victorian Auditor General's report '*Planning for Water Infrastructure in Victoria*' (April 2008) which revealed the lack of stakeholder consultation and the 'inadequate levels of rigor applied to estimate the costs, benefits and risks' of this project in particular, and other Victorian water plan projects.

Moreover, the Commonwealth proceeded to approve this project, with conditions, based on this unsatisfactory and incomplete process that lacks accountability and credibility.

4. Given that the Sugarloaf Pipeline Project proponent is in the process of carrying out threatened species surveys and, depending on the survey results, implementing species-specific management plans in stages as the project is being constructed and implemented, this approach severely compromises options and strategies necessary to effectively protect Matters of National Environmental Significance within a bioregional context.

Also, results of recent research published by CSIRO and Birds Australia in relation to climate change have major implications that are particularly relevant to this project, yet they have not been considered as part of the project impact assessment.

The combination of the impacts of habitat loss and fragmentation will be compounded by climate change. Accordingly, the proposal to replace 'habitat hectares' elsewhere in the bioregion needs to be reconsidered under the climate change scenario, particularly in terms of the long-term survival of:

Sections 16, 17B : Wetlands of international importance

Sections 18, 18A :Threatened species and ecological communities

Section 20: Migratory species

within the project area and downstream of the take-off point at Yea.

Importantly, in accordance with the EPBC Act – *Environment Assessment Process Guidelines*, replacing "habitat hectares" elsewhere in the bioregion is intended to compensate for habitat loss, but this action does NOT mitigate the impacts of habitat fragmentation or these cumulative impacts on threatened species likely to be affected by this project.

5. Environmental Risk Assessment and Accountability

The project PIA did not determine the magnitude of specific environmental impacts and the risks associated with these impacts. It also lacked quantitative baseline data as an integral part of risk assessment comprising statistically designed and implemented monitoring and mitigation programs.

This information is essential to determine if the project proceeds, and if it does, to effectively and objectively, assess and quickly address impacts during project construction and operation with respect to significant environmental (aquatic and terrestrial) and cultural heritage values and also, to determine compliance with species-specific Recovery Plans and predetermined standards.

Recommendations

1. Referral documentation needs to be substantially complete prior to being submitted for EPBC decisions and community consultation.
2. EPBC ‘accredited processes’ for ‘controlled action’ determinations need to conform to a formally recognised process under State/Territory legislation and be complete **prior to** community consultation and panel hearings.
3. All major infrastructure projects should require an Environmental Impact Statement consistent with the EPBC Act. The EIS should include the results and analyses of species-specific and ecological community surveys, including seasonal surveys over a minimum 12 month period to ensure adequate assessment of seasonal variability as a basis for detailed evaluation in accordance with EPBC Guidelines for ‘*significant impact criteria*’. This quantitative baseline data is also essential as an integral part of risk assessment comprising statistically designed and implemented monitoring and mitigation programs
4. With respect to the Environmental Impact Statement, the project proponents should be requested to follow the approach developed by the Ecological Society of Australia in their Position Statement on Environmental Impact Assessment as all the issues highlighted below are particularly relevant:

“the Ecological Society of Australia (ESA) advocates peer review of ecological studies for EIA to help ensure competent work and adequate scales of investigation. Adequate time and funding should be available for comprehensive ecological studies when these are justified for decision-making purposes. The conclusions drawn in ecological reports for EIA should always be substantiated by data or reference to the literature. The proponents of large developments, likely to have significant ecological impacts, should be required to support rigorous scientific monitoring programs. This involves replicated sampling before and after the development commences, at impact and control sites, to detect human impacts above those which could be attributed to natural variation.” (Source: <http://www.ecolsoc.org.au/>)

Yours sincerely,

Ann Jelinek