

**29 January 2016**

## **GREENPEACE SUBMISSION TO THE INDEPENDENT REVIEW OF THE WATER TRIGGER LEGISLATION**

This submission has been prepared by Greenpeace Australia Pacific Ltd (GPAP) in response to the request for submissions to the Independent Review of the 'Water Trigger' Legislation by the Department of the Environment.

GPAP is an organisation of over 500,000 people, including board members, staff, activists, volunteers and supporters who care deeply about protecting the environment. GPAP stands for positive change through action. We investigate, expose and confront environmental abuse in Australia and around the world. We champion environmentally responsible and socially just solutions including scientific and technological innovation.

The 'Water Trigger' is the common name for a legal requirement in national environmental law that 'triggers' a requirement for the Minister of the Environment to assess and approve coal seam gas and large coal mining developments that will have, or are likely to have a significant impact on a water resource. The 'Water Trigger' represents an important step in the strengthening of Australia's environmental law but if deteriorating environmental outcomes in Australia are to be reversed then the 'Water Trigger' and the Environmental Protection and Biodiversity Act (1999) (EPBC) need to be strengthened further.

Both Federal and State Governments in Australia have poor records when it comes to environmental approvals but the solution is not to do away with approvals as members of the current Coalition Government have suggested but to improve the operations of environment departments and increase the opportunity for community and stakeholder participation in the approval process. Since the introduction of the 'Water Trigger' there has been no conclusive scientific evidence to demonstrate the coal seam gas or large coal mining projects are no threat to impacted water, in fact, the opposite is the case.

The extraction of shale gas in the near future may have similarly negative impacts upon water supplies.

Just as scientific problems remain the levels of community concern regarding the impacts of coal seam gas and coal projects on water remains acute.

GPAP submit the 'Water Trigger' should be retained and strengthened.

GPAP make the following recommendations:

- Strengthening the 'Water Trigger' is crucial if Australia is to protect its most valuable national resource, water.

- Responsibility for assessing and approving projects must remain with the Federal Environment Minister.
- Landholders should be given the right to say no to coal and coal seam gas developments on their land.
- Extend this protection for our national water resource to include significant impacts from shale and tight gas mining and underground coal gasification in light of the proposed mining of shale gas in Western Australia
- The Independent Expert Scientific Committee (IESC) was established at the Federal level to provide transparent advice to the process and provide a platform of scientific evaluation and risk assessment on the specific landscapes where water resources could be impacted. The IESC should be required to advise on whether a project should be approved, and that advice should be binding on the Minister.
- If the Government do not accept these recommendations GPAP recommend the Australian Government refrain from changing the EPBC until the Australian Panel of Experts in Environmental Law reports later this year and subsequently considers its recommendations and those of other stakeholders before considering any changes to the EPBC.

## History of the 'Water Trigger'

The Independent Review of the 'Water Trigger' Legislation is a statutory review that comes 2 years of the Water Trigger Amendment was introduced. The Federal Labor Government introduced the 'Water Trigger' legislation into Parliament on 13 March 2014. The 'Water Trigger' brings a project in for possible consideration under the EPBC Act. But there is no guarantee that it will then be assessed under the Act. And there is certainly no guarantee that it will prevent projects from proceeding or prevent environmental damage. The 'Water Trigger' represents an important layer of protection for stakeholders in our national water resources that may not be ideal, the Minister is not required to abide by environmental assessments and the 'Water Trigger' has not prevented any project approvals but it does provide more trust around approvals for communities and advances the precautionary principle that, according to the EPBC:

*"If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."*<sup>1</sup>

The legislation that established the water trigger is the Environment Protection and Biodiversity Conservation Amendment Act (EPBC Amendment Act) 2013. This amendment added water to an existing list of matters of national environmental significance in the EPBC Act. While the EPBC Act generally contains better environmental safeguards than State and Territory environmental

<sup>1</sup> Environment Protection and Biodiversity Act (1999) Section 3A (b).

legislation it does not provide adequate protection to the Australia's unique and fragile environment.

### **Why do we need a 'Water Trigger'?**

The Environment and Communications Legislation Committee Report into the Environment Protection and Biodiversity Conservation Amendment Bill (Provisions) 2013 acknowledged the importance of Australia's water resources and the importance of Federal oversight for a national resource. The Report stated:

*"Given that water is the most important of the nation's natural resources it is both necessary and appropriate that the assessment and approval for these activities should be at the national level."*<sup>2</sup>

The Commonwealth's application of the precautionary principle is important because the principle is absent in some states. In Western Australia neither the precautionary principle nor ecologically sustainable development is mentioned in the equivalent legislation. Conversely in Queensland, the precautionary principle is well recognised as a mandatory consideration forming part of the 'standard criteria' for project approvals.

Australia's environmental laws have not been effective in arresting worsening environmental outcomes and weakening the approvals process would be disastrous. Australia has one of the worst rates of species loss in the world and we have lost 10% of our mammals, that's 35% of all the worlds' mammal extinctions anywhere.<sup>3</sup> Since 2014 Australia has dropped ten places to thirteenth in the Yale Environmental Performance Index.<sup>4</sup> Australia's environmental laws are not designed to deal with the incremental and cumulative problems such as Climate Change and as Australia faces more climatic extremes we can expect the pressure on our water resources to increase.

### **Coal seam gas and coal projects may have dangerous impacts on our water resources.**

There is still significant uncertainty about the impacts of coal seam gas extraction and, although to a lesser extent, large coal mining operations.

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<sup>2</sup> Senate Environment and Communications Legislation Committee Report into the Environment Protection and Biodiversity Conservation Amendment Bill (Provisions) 2013. Paragraph 3.95 (P.31)

<sup>3</sup> ABC News 2 October 2015 <http://www.abc.net.au/news/2015-02-10/losing-australian-native-mammals/6082624>

<sup>4</sup> Yale Environmental Performance Index January 2016. <http://epi.yale.edu/reports/2016-report>

Government studies cite a real risk of irreversible damage to our water, ecosystems, urban catchments and productive agricultural areas.<sup>5</sup>

The IESC and other bodies are yet to reach an informed conclusion on hydrological risks. The knowledge of the relationship between groundwater to surface water is, at best, limited. Further, there is a need for 'bioregional assessments' of catchments that are potentially sensitive to groundwater impacts prior to the granting of approval for extractive activities.

Ms Simone Marsh was a former analyst with the Queensland Co-ordinator General, whose role included authoring a report on the environmental effects of the proposed LNG industry. Ms Marsh was part of the Queensland Government team that approved Santos's \$18 billion and Queensland Gas Company's (QCG) \$20 billion LNG projects in 2010.

Ms Marsh told the ABC Four Corners program that the final stages of the three-year approval processes were rushed and the environmental impacts not properly assessed. Ms Marsh told the ABC:

*"All the scientific arguments in the world wouldn't have changed things in that situation... They had decided they wanted to go ahead with the projects and there was nothing stopping it."*

In 2010, during the final stages of the three-year approval process - after assessing the environmental impact statements (EIS) and supplementary materials ahead of the Coordinator-General's report - she repeatedly raised concerns about the lack of key information in the documents.

Ms Marsh said she tried to raise her serious concerns about the missing information with the companies and, internally with senior management, but it "became apparent" to her that the Government was going to proceed without it and only ask for the details after the process had concluded.<sup>6</sup>

Dr Chris McGrath, a senior lecturer in environmental regulation at the University of Queensland, who appeared in a private capacity before the Environment and Communications Legislation Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Provisions) Bill 2013 quoted from a report of the Queensland Coordinator-General on the approval of the Santos GLNG project that, he submitted to the Senate Inquiry, reflected poor decision

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<sup>5</sup> General Purpose Standing Committee No 5, Legislative Council of NSW, Coal Seam Gas (2012) National Water Commission, 'Position Statement: Coal Seam Gas and Water' (Report, December 2010)

<sup>6</sup> Ms Simone Marsh. ABC News 1 April 2013. <http://www.abc.net.au/news/2013-04-01/key-information-missing-from-lng-approvals/4603026>

making and demonstrated a need for Commonwealth oversight for water resources affected by coal seam gas development.<sup>7</sup>

The Federal Government have similarly shown little attention to environmental approvals, although not related to the 'Water Trigger', on August 5th 2015 the Commonwealth agreed to consent orders issued by the Federal Court to set aside the Environment Minister's decision to approve Adani's Carmichael Coal mine in Queensland. The decision concluded Federal Court proceedings commenced by the Mackay Conservation Group in (Mackay Conservation Group Inc. v Commonwealth et al (2014)).

The Mackay Conservation Group identified that the decision brief to the Environment Minister on the Carmichael mine failed to include the 'conservation advice' on two species that will be harmed by the mine. The Federal Court found the failure to include this advice contravened the procedural provision of the legislation and was sufficient to invalidate the relevant approval decision.

### Community and Stakeholder concerns

Since Ms Marsh has claimed the approvals process is seemingly uninterested in the science or the environmental impact of coal seam gas community concern has grown. The importance of community and stakeholder participation was highlighted by the Environment and Communications Legislation Committee report into The Environment Protection and Biodiversity Conservation Amendment Bill (Provisions) 2013. The Committee reported that:

*"The committee received much evidence which demonstrated that there is a high level of concern in the community, especially in rural areas, about the possible adverse effects of CSG and coal mining on the availability and quality of water resources. There is also a strong feeling that the assessment and approval processes for these developments are inadequate."*<sup>8</sup>

The Federal Environment Minister that introduced the 'Water Trigger', the Honourable Mr Tony Burke MP, echoed the report and he said:

*"The Water Trigger will simply give the federal government the clout the public assumed it already had. Realistically whenever I have made a decision on coal*

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<sup>7</sup> Dr Chris McGrath, Additional Information 2 May 2013 in Senate Environment and Communications Legislation Committee Report into the Environment Protection and Biodiversity Conservation Amendment Bill (Provisions) 2013 (PP.5-6)

<sup>8</sup> Senate Environment and Communications Legislation Committee Report into the Environment Protection and Biodiversity Conservation Amendment Bill (Provisions) 2013. Paragraph 3.94 (P.30)



*seam gas, the Australian public would expect that we are taking into account all the impacts on our precious water resources.”<sup>9</sup>*

If the social license for coal seam gas and coal projects is to be maintained then community concerns about environmental impacts must continue to be taken into account. The additional costs imposed by assessments should be viewed in the context of the need for the industries to allay community concerns about their operations, and this is an area where industry has very conspicuously failed. The Committee noted that:

*“The Committee considers that, if the CSG and coal mining industries are to have a social licence’ to operate, this bill is needed and, to the extent that bill alleviates widespread public concern, both the community and the industries would benefit if it were to be passed.”<sup>10</sup>*

## Conclusion

Since the election of the Federal Coalition Government in 2013 it has made several attempts to weaken the EPBC Act. The Government claim to be acting in the interests of streamlining and simplifying approvals but there is no evidence to suggest approvals will be granted more quickly and there is considerable evidence to indicate that approvals are already flawed and lacking in transparency. This poses a grave risk to Australia’s most precious resource, water. GPAP is particularly concerned the Commonwealth is attempting to retreat from environmental assessments and project approval and leave this responsibility to the States. The environmental laws of the States and Territories are weak and cannot take into account matters of national interest and importance. States are not mandated to act in the national interest, and States directly benefit from projects they are assessing. Environmental laws are not red tape or a burden but a critical element of a healthy society. Environmental laws protect our fragile ecosystems but also our health, communities, economy and our future. Environmental laws should not be assessed by the projects they’ve facilitated but by their environmental outcomes.

Environmental legislation in Australia, such as the EPBC, has generally worked on the assumption that projects should be allowed to proceed provided they do not present unreasonable risk of harm to the environment or human health. At the moment environmental impacts are treated as considerations that may be traded off against other considerations such as minerals exports. The next generation of Australian environmental law needs to be guided by a different

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<sup>9</sup> Federal Minister for the Environment, the Honourable Tony Burke MP reported in The Age 12 March 2013. <http://www.theage.com.au/federal-politics/political-news/more-powers-on-csg-mines-meets-public-expectations-20130312-2fxqt.html>

<sup>10</sup> Senate Environment and Communications Legislation Committee Report into the Environment Protection and Biodiversity Conservation Amendment Bill (Provisions) 2013. Paragraph 3.21 (P.14)

calculation in order to arrest the decline in our key environmental indicators; the new laws need to be underpinned by the principle that environmental harm should always be avoided except where there is a compelling public interest. Removing the 'Water Trigger' would mean worsening degradation and loss of matters of national environmental significance, would contravene the nation's international obligations and would not be in the public interest.