

January 2016

Independent Review of the 2013 EPBC Act Amendment (Water Trigger) - 2016 Review Submission

Water Trigger Review
GPO Box 787
Canberra ACT 2601 Australia
By email: wtreview@environment.gov.au

Dear Review Secretariat,

The Wilderness Society welcomes the opportunity to provide comment to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) Water Trigger Amendment Act 2013 (the Review).

About Our Organisation

The Wilderness Society is an Australian, community-based, not-for-profit, non-governmental environmental advocacy organisation, formed in 1976 by a small group of concerned Australians who came together to launch a campaign to protect the wild Franklin River in south west Tasmania.

Our shared organisational purpose is to protect, promote and restore wilderness and natural processes across Australia for the survival and ongoing evolution of life on Earth. We operate campaigns to safeguard our sources of clean water and air, to tackle dangerous climate change, to create a safe future for life on Earth, and to give a better world to our children. Our organisational vision is an Australian society that protects and respects the natural world to create a vibrant, healthy continent with positive connections between land, water, people and wildlife.

We enjoy a diverse membership of 34,000 Australians from across Australia. We represent the views and concerns of our members and a wide range of Australians on major environmental issues.

Water Trigger Amendment

Background

The 2013 Water Trigger Amendment empowers the Commonwealth to assess, approve and place water-related conditions on coal and coal seam gas (CSG) extractive activities which are likely to have a significant impact on water resources. Previously, water-specific conditions could only be imposed on projects by the Commonwealth if the project was designated a controlled action under the EPBC owing to a separate trigger (for example, if a coal project contaminated a water reserve designated as habitat for a nationally listed species or ecological community).

The Water Trigger Amendment was introduced as the result of growing recognition by both the Federal Government and communities that water resources in Australia are worthy of careful and cooperative protection by all levels of Government. It was also intended to respond to growing community concerns about the impact of extractive projects on one of our most precious, and scarce, resources.

Widespread concern about these activities is still growing in the community. Recent polls have shown that the majority of Australians are concerned about the impact of coal¹ and CSG² projects on the environment, especially on agricultural land and water resources.

Need for Commonwealth oversight of water resources

The Wilderness Society believes that the Commonwealth has a fundamental responsibility to lead, coordinate, fund, monitor and enforce the protection of Australia's environment, especially in matters that affect environmental resources that cross state boundaries or are of national significance. We believe that in the absence of concerted Commonwealth leadership, there is little prospect of coherent and effective continent wide legislation, policies and programs.

We strongly support the notion that water resources are designated as a 'matter of national environmental significance', especially in relation to extractive developments, as

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<http://www.smh.com.au/business/mining-and-resources/poll-ed-queenslanders-want-to-phase-out-coal-to-save-great-barrier-reef-20151216-glp6bm.html>;

<http://www.smh.com.au/federal-politics/political-news/voters-in-turnbull-hockey-seats-would-back-ban-on-new-coal-mines-survey-20151029-gkluor.html>

² <http://www.australianmining.com.au/News/NSW-voters-against-CSG-poll>;

[http://www.weeklytimesnow.com.au/news/politics/victorian-votes-will-change-the-way-they-vote-to-stop-coal-seam-gas-mining/news-story/f111066375a77af199683f0fc0b86433?="](http://www.weeklytimesnow.com.au/news/politics/victorian-votes-will-change-the-way-they-vote-to-stop-coal-seam-gas-mining/news-story/f111066375a77af199683f0fc0b86433?=)

impacts on water resources are often neither local nor short-term. Partially this is as the catchment area or environmental footprint of water resources often cross state boundaries (for example, the Namoi River), as may the actual water resource itself (for example the Great Artesian Basin or Murray-Darling River).

Even those water resources whose boundaries lie entirely within one state should be treated as nationally significant because they support:

- industries of national importance (for example, the highly productive farming areas like Margaret River, Darling Downs, Queensland Central Highlands and NSW Liverpool Plains);
- environmental areas of national importance (for example, Queensland's Lockhart or Fitzroy Rivers which provides vital flows for, or whose contamination could pollute, important areas of the Great Barrier Reef);
- Communities that are of national importance (such as the catchment areas for Sydney's drinking water); or
- Irreplaceable cultural activities (for example, groundwater in the Fitzroy River (WA) catchment in the Kimberley, which supports Traditional Owner cultural practices connected with the dry season springs and groundwater dependent ecosystems of the region).

State oversight of water resources

We believe it is inappropriate to leave State and Territory Governments as the sole assessment authorities over the water impacts of extractive activities.

Firstly, State based regulation is simply not equipped to assess, prevent and manage impacts across jurisdictional boundaries. For example, the dewatering of the Walloon Coal Measures in Queensland's Surat Basin have affected adjacent Great Artesian Basin (GAB) aquifers.

The Surat Catchment Area includes aquifers of economic importance and which feed 71 spring complexes and 43 watercourse springs, some of which are of national ecological and cultural significance³. While the Queensland Government has established measures to manage the Surat Cumulative Management Area (currently under review), major developments continue to be approved despite major concerns being raised about a lack of information on the long-term effects of these activities on the GAB water resource and

³ https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0017/31328/ogia-surat-uwir-summary.pdf

dependant ecosystems and industries⁴.

Secondly, most State based regulation does not deal with the flow-on impacts to the social and cultural values of water. One example of this is that of the Rey Resources proposed “Duchess Paradise” coal mine, within the catchment for the heritage listed Fitzroy River (WA). This proposal sought to source 1.5 Gigalitres of water per year from on-site dams through the wet season and groundwater sources from a local bore. Due to insufficient regulation at the State level, the company made no efforts to understand the interconnected nature of the surface and groundwater of the Fitzroy river, which could have significant impacts on Traditional Owner cultural practices connected with 'jilas' (permanent dry season springs) or dry season groundwater dependent ecosystems.

Thirdly, most State based regimes do not consider the cumulative impacts of multiple extractive activities. In the Hunter Valley, for example, there are large open cut coal mines in close proximity to each other that are significantly altering the groundwater hydrology of the Valley and fundamentally altering the catchments of the creeks that feed the river system. Despite recent changes in NSW legislation, the cumulative impact of the last ten years’ of approval decisions by the New South Wales Government have not been properly assessed and understood.

There have been also been well documented failures of State based regimes in considering likely significant environmental impacts. Examples include the NSW Government’s 2013 approval of BHP’s Dendrobium mine in Wollongong despite that no adequate groundwater impact study was supplied until 13 months later⁵, and the invalidation of the approval of the James Price Point gas facility by the WA Supreme Court due to decision-maker conflicts of interest⁶.

There is an inherent conflict of interest in designating the States and Territories as main approval and assessment authorities for extractive activities given the financial return that they receive from these projects through royalties. Recent ICAC investigations in NSW around extractive project approvals and licensing, in particular, have further eroded public confidence in the ability of the States to manage our precious water resources.

In light of these deficiencies, we believe that the Water Trigger forms a safety net to

⁴ <http://www.environment.gov.au/epbc/notices/pubs/gladstone-ga-report.pdf>;

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<http://www.smh.com.au/environment/water-issues/bhps-coal-mine-approved-in-sydneys-catchment-without-groundwater-assessment-20150729-gimxxw.html>

⁶ Wilderness Society of WA (Inc) v Minister for Environment [2013] WASC 307 (19 August 2013).

prevent perverse outcomes on one of Australia's most important natural resources, not an unnecessary duplication of efforts between the State and Commonwealth Governments. Given there is little evidence that the water trigger has significantly increased assessment times⁷, we think that the Water Trigger should be seen as a pragmatic addition to Australia's resource management regime.

Regulatory mechanism

The terms of reference require the Review to address whether the market would not resolve the problem over time. In the Wilderness Society's opinion, markets do not have the capacity or inclination to deal with the myriad of problems that surround water impacts from extractive projects, and have singularly failed to do so over many decades. Indeed, the primary mechanism by which impacts on water resources are priced in the resources market in Australia comes from Governmental regulation of negative impact.

This is especially true as market decisions tend to be made on a project by project basis. Project-based assessments externalise impacts on water resources and other water users, and whole industries and the environment are degraded and jeopardised as a result.

Mechanics of the Act

Current working of the Water Trigger Amendment

There is certainly evidence that gaps in State based regulation have been filled by the Water Trigger. The Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) provides significant expertise to inform and provide credibility to assessment processes. In particular cases the IESC and the Federal Environment Minister have also played a valuable role in providing a "house of review" on extractive activities.

For example, the Wilderness Society strongly supports the decision to review water impacts arising from Santos' Narrabri CSG plant proposal in the sensitive Namoi catchment (EPBC 2014/7376)⁸. While Santos is yet to seek final approval for the project, we believe that significant community concern about the proposed development, its situation in the important Namoi River catchment area, and potential impacts on the limited water resources in this agriculturally important region, demonstrate the value of the Commonwealth providing credibility to and a "house of review" for controversial extractive activities.

⁷ http://www.nela.org.au/NELA/Documents/Better_Protection_or_Pure_Politics.pdf

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<http://epbcnotices.environment.gov.au/referralslist/referral-details/?id=47ab7218-4c67-e511-b4b8-005056ba00ab>

We also support the use of the Water Trigger in amending Wollongong Coal’s controversial Underground Expansion Project proposal for its Russell Vale mine in Sydney’s drinking water catchment (EPBC 2014/7268). Wollongong Coal had sought and obtained from the NSW Government a series of planning consents for smaller components of the project, incrementally gaining approval for the project without consideration of the cumulative impact.

One of these incremental approvals was for the project’s Longwall 6 panel (EPBC 2014/7259), approved by the NSW Government. Advice from the IESC informed the Federal Environment Minister that the risk to some of the upland swamps that filter and release clean water to the city’s dams was too great, but that this risk could be managed if the mine plan was altered. The approval under the EPBC approved only 365m of the longwall, not the 400m sought by the company, crucially avoiding undermining one of the at-risk swamps⁹.

In a larger sense, the Wilderness Society also supports the way in which the precautionary principle is internalised into key phases of decision-making under s 391 of the EPBC Act. Under this provision, the Minister must consider the precautionary principle when deciding whether a proposed large coal mining or CSG development is a ‘controlled action’, and when deciding whether to approve the development. Given the importance of water resources to other industries, communities and the environment, we believe that strong application of the precautionary principle is necessary in dealing with potential impacts of extractive projects.

However, the Water Trigger has been unevenly applied and some poor decisions have been made under it, indicating that improvements to the Water Trigger are necessary.

Potential improvements in the Water Trigger Amendment

IESC Advice

The IESC’s project advice has not been well utilised by state government decision makers and assessment procedures. The advice the IESC provides is often ignored and the requirement that this advice be “considered” is all the loophole that Federal and State Ministers need to fail to heed warnings made by the committee. This is a grave cause of concern, and is severely undermining community confidence in the regulation of mining in

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<http://www.iesc.environment.gov.au/system/files/resources/5d372fe8-dab2-409e-93a5-d8b7ab759f6e/files/iesc-advice-santos-2014-061.pdf>

Australia.

A good example is the expansion to Santos' GLNG Gas Fields Development Project (EPBC 2012/6615). Serious concerns about the project had been raised in two IESC assessments of the project (EPBC 2012/6357¹⁰ and IESC 2014/061¹¹), which found that the project had the potential to:

- Reduce water supply to Groundwater Dependant Ecosystems, including the Great Artesian Basin and endangered ecological communities; and
- Change groundwater and runoff water quality due to direct project activities.

The IESC assessment also found that there was “insufficient” hydrological information on potential impacts of the project and that there were concerns about the cumulative impact of Surat and Bowen basin activities on groundwater pressure. However, the project was sent for assessment and approval by the Queensland Government under the bilateral assessment agreement and was duly approved with minimal conditions around “monitoring”, with no consideration to cumulative impacts before that approval was given¹².

The referral to state assessment came despite serious concerns being raised about the previous Queensland Government's environmental impact assessment and approval of Santos projects¹³. This outcome illustrates the problematic nature of State Governments, who (as noted above) have a financial interest in approving projects, being given full assessment powers over projects with significant water impacts. The Wilderness Society strongly believes that in any case where the IESC identifies concerns about a projects' impact on significant water resources, the decision to approve and place conditions on that project should always remain with the Federal Environment Minister.

We also believe there should be hard and clear triggers and thresholds that ensure the Minister cannot approve coal and unconventional gas mining projects that have unacceptable impacts on nationally significant water resources. Most simply, this would mean exclusion areas for highly productive aquifers and nationally significant water resources, as well as threshold standards of mine design, such as the need for dams to withstand 1-in-1000 year average return interval floods; the need for all pits to be

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<http://www.iesc.environment.gov.au/committee-advice/proposals/santos-future-gas-supply-iesc-project-advice>

¹¹ <http://www.iesc.environment.gov.au/committee-advice/proposals/santos-gas-fields-advice>

¹² <http://www.dilgp.qld.gov.au/resources/project/santos-glng/santos-glng-report-on-final-eis.pdf>

¹³ <http://www.abc.net.au/news/2013-04-01/key-information-missing-from-lng-approvals/4603026>

remediated, rather than left behind as voids; and the need to ensure that all surface water meets ANZECC guidelines.

In general advice from the Committee is not made publicly available in a timely manner. It is generally not released until after the relevant state government has already approved a development. This is not helpful in terms of informing communities and in fact, tends to undermine confidence in the process. We believe that the IESC's advice on specific projects should be made available to the public at the same time that it is provided to Government (State or Federal). Such a step would markedly increase the timely provision of information to the community.

Scope of the Water Trigger

The Wilderness Society also believes that the scope of the Water Trigger is too narrow, and should apply to the emerging shale gas and tight gas industries, which have been shown in the United States¹⁴ to have similar potential to threaten valuable water resources¹⁵.

We also believe that the Water Trigger should apply not just to extractive activities but also to large scale development of supporting infrastructure for those activities, where they are likely to have potential water resource impacts, for example holding dams, and brine and salt storage. Related water developments for coal mining and unconventional gas are not triggering the law, such as an expanded borefield to supply the Boggabri mine and the cumulative impacts large dams in Central Qld proposed in order to supply water for coal mines. These are clearly water impacts of coal mining, and should be subject to assessment and determination under the water trigger.

Next generation nature protection in Australia

As stated above, the Wilderness Society believes that the Commonwealth has a fundamental responsibility to lead, coordinate, fund, monitor and where needed enforce the vital protection of Australia's environment. We believe that without this there is little prospect of coherent and effective continent-wide legislation, policies and programs.

Australia is one of the most biologically diverse countries on the earth, with nineteen World Heritage properties, sixty-five Ramsar wetlands and more than one million species of plants and animals found nowhere else on Earth. However, Australia faces unprecedented ecological challenges. These include water scarcity, looming extinctions of

¹⁴ https://www.elsevier.com/_data/assets/pdf_file/0010/97057/effects-of-shale-gas-exploration.pdf;
<http://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=244651>.

¹⁵ http://www.nela.org.au/NELA/Documents/Better_Protection_or_Pure_Politics.pdf

many endemic plants and animals, significant impact of mining and gas extraction on health and water, and the effects of climate change.

To best protect and preserve the health of our environment and the communities that rely on it, we need a robust and integrated system of environmental management at the State and Federal level. We also believe that Australia should have an Independent National Environmental Protection Agency to administer national environment law, coordinate national nature conservation strategies and provide publicly available evidence-based assessment and monitoring of environmental issues. Such an agency must be free from political interference and decision making, be defined in law and have sufficient capacity, resources and system to regulate, monitor and implement environmental legislation and conservation programs. Such a body must also play a central role in coordinating programs and processes with state and territory governments.

We believe it is essential that national nature conservation laws and institutions are reformed, with the Commonwealth taking a strong, national leadership role in ensuring robust and evidence-based protection of our valuable natural assets. We support efforts to reform these laws, including the ongoing and critical work of the Australian Panel of Experts on Environmental Law (APEEL)¹⁶.

¹⁶ <http://apeel.org.au/>

Recommendations

The Wilderness Society recommends that:

- The Water Trigger be retained in the EPBC Act and that the Commonwealth retains the ability to review, assess and place conditions on extractive coal and coal seam gas projects;
- That in any case where the IESC identifies concerns about a project's impact on significant water resources, the decision to approve and place conditions on that project under the Water Trigger should always remain with the Federal Environment Minister;
- There should be hard and clear triggers and thresholds that ensure the Minister cannot approve coal and unconventional gas mining projects that have unacceptable impacts on nationally significant water resources, including exclusion areas for highly productive aquifers and nationally significant water resources, and threshold standards of mine design;
- The IESC's advice on specific projects should be made available to the public at the same time that it is provided to Government (State or Federal);
- The Water Trigger should apply to the emerging shale gas and tight gas industries, and also to large scale development of supporting infrastructure for those activities, where they can be shown to have potential water resource impacts;
- Commonwealth and State Governments commit to developing coherent and effective continent-wide legislation, policies and programs that ensure Australia's biodiversity, climate and valuable natural assets are protected; and
- The Commonwealth Government should commit to establishing an independent and adequately resourced National Environmental Protection Agency to administer national environment law, coordinate national nature conservation strategies and provide publicly available evidence-based assessment and monitoring of environmental issues.