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in public interest environmental law.*

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Referral Business Entry Point (EPBC Act)
Approvals and Wildlife Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
Canberra ACT 2601

By email: epbc.referrals@environment.gov.au

**SOUTH AUSTRALIAN DEPARTMENT FOR ENVIRONMENT AND
HERITAGE/WATER MANAGEMENT AND USE/GOOLWA CHANNEL/SA/GOOLWA
CHANNEL WATER LEVEL MANAGEMENT PROJECT
REFERENCE NUMBER: 2009/5227**

EXECUTIVE SUMMARY

SIGNIFICANT IMPACTS

The proponent seeks to extend the operation of the regulators in the Ramsar listed region of the Coorong, Lake Alexandrina and Lake Albert for an unspecified period.

However, the regulators, which effectively operate as weirs, are likely to continue to have significant impacts on matters of national environmental significance, being the Ramsar listed Lake Alexandrina and Lake Albert as they divert water from the Lakes¹. This in turn is likely to have a significant impact on the listed threatened species and ecological communities² and listed migratory species³ protected by the EPBC Act.

Whilst the Clayton regulator has siphons installed to allow water to be released once water levels reach +0.7 AHD⁴, the first 700 metres of water is retained within the pool

¹ S16 Environment Protection and Biodiversity Conservation Act ("EPBC Act")

² Ibid, sections 18 and 18A

³ Ibid, sections 20 and 20A

⁴ Proponent's Referral p4

enclosed by the regulators and so never reaches Lake Alexandrina and Lake Albert and the wetlands, biota and birds which they support. This means that water which is vital to the continuing survival of this Ramsar listed wetland is unavailable. In any event, it is unclear whether water (which passes the 700 metre level) has been released via the siphons and the proponent should provide details of any such releases to the Minister prior to his decision.

For these reasons the proposed action should not be allowed to proceed further pursuant to sections 74B and 74C of the EPBC Act.

If the Minister is minded to allow the proposed action at this point (which we submit should not occur), then the action should be considered a controlled action for the purposes of the EPBC Act given the unacceptable impacts on matters protected by Part 3 of the EPBC Act.

Further, we respectfully submit that the Minister should, pursuant to section 76 of the EPBC Act, request any reports which the proponent possesses with respect to the proposed action.

If the Minister determines that the proposed action is a controlled action, then, given the impacts on the environment are likely to be significant, it should be assessed at the highest possible level, that is, by way of public inquiry or in the very least by the production of an Environmental Impact Statement ("EIS") and the appropriate public consultation.

Whilst the proponent adopts the precautionary principle to support the continuation of the regulators⁵, this principle is not jeopardized by the Minister thoroughly assessing the basis on which the regulators have been installed and the time frame and requirements for decommissioning.

Finally, as indicated below, the action:

- is a development pursuant to the Development Act (SA) 1993 and so no decision should be made by the Minister until approval has been obtained under that Act or in the very least, State and Federal approval processes should operate simultaneously; and
- breaches the proponent's statutory duties set out in the Natural Resources Management Act (SA) 2004 and so no permit should be granted for the action.

BACKGROUND AND FACTS

On 2 April 2009, the proponent forwarded a referral to the Federal Minister under the EPBC Act which sought to install regulators at Clayton, Currency Creek and the Finnis

⁵ Ibid p26

River as part of an **emergency** response to the management of acid sulfate soils in the region.

On 12 May 2009, the federal Minister for the Environment, Mr Peter Garrett, determined that this action was not a controlled action provided that it was taken in a manner set out in the decision which included:

- The decommissioning and removal of the regulators by 6 May 2011;
- On decommissioning, each site was to be returned to their original (pre-construction) bathymetry.

On 1 December 2009, the proponent forwarded a second referral to the federal Minister, Mr Peter Garrett seeking the retention of the regulators for an unspecified period. This is despite the clear mandate in the original decision that the regulators be removed by 6 May 2011 and is contrary to the proponent's reference to the regulators as "temporary" in the referral.

The decommissioning triggers in the current referral lack specificity. The proponent indicates that "the basic trigger for removal of the temporary flow regulators is currently being further developed."⁶

The current triggers are based on water quality and water quantity level which may never be reached⁷ and so are likely to be unrealistic. In addition, the triggers are based on scientific assessment which has not been tested or assessed by the process envisaged by the EPBC Act, such as by way of a public inquiry or an environmental impact statement.

The EPBC Act legislates for an assessment process to assess controlled actions, that is, actions which are likely to have a significant impact on matters of national environmental significance under the Act, in this case, the Ramsar listed Coorong, Lake Alexandrina and Lake Albert and the listed threatened species and ecological communities and listed migratory species protected by the EPBC Act.

However, as the first regulators' referral was not determined to be a controlled action, no thorough assessment (as envisaged by the EPBC Act) has been undertaken by the federal Minister to assess the actual impacts of the regulators on these matters of national environmental significance. Further, the science on which the first referral is based has not been thoroughly tested. This is despite the fact that the proponent has scientific reports available⁸ which provide findings contrary to the South Australian

⁶ Referral p20

⁷ Ibid

⁸ Reports including:

- Earth Systems, "Lower Murray Lakes Project: Management Options for Acid Sulfate Soils in the Lower Murray Lakes, South Australia, Stage 1 – Preliminary Assessment of Treatment Options" December 2008;
- Earth Systems, "Lower Murray Lakes Project: Management Options for Acid Sulfate Soils in the Lower Murray Lakes, South Australia, Stage 2 – Preliminary Assessment of

government's assessment of acid sulfate soils. These reports propose other credible options for the treatment of acid sulfate soils which do not have the intrusive impact of the regulators on the region.

If the Minister has not received these reports we respectfully submit that prior to any decision, the Minister should request these reports (and any reports which the proponent has regarding the action) from the proponent pursuant to section 76 of the EPBC Act and should review these reports in the light of the likely significant impacts of the action.

As set out above, the proposed action has unacceptable impacts on matters protected by Part 3 of the EPBC Act. In addition, the proposed action is contrary to Federal and the South Australian government's obligations under international conventions and the objectives and provisions of Federal and State legislation and subordinate legislation and policy. For these reasons the Minister should determine that the proposed action is clearly unacceptable and not approve it pursuant to sections 74B and 74C of the EPBC Act.

However, If the Minister is minded to allow the action at this point (which we submit should not occur), then the action should be considered a controlled action for the purposes of the EPBC Act given the unacceptable impacts on matters protected by Part 3 of the Act.

If the Minister determines that the proposed action is a controlled action, then, given the impacts on the environment are likely to be significant, it should be assessed at the highest possible level, that is, by way of public inquiry or in the very least by the production of an environmental impact statement ("EIS") and the appropriate public consultation.

LAW

In the referral, the proponent cites international treaties and Federal and State legislation. Whilst such reference is not relevant to the decision to be made in this instance, we note that the proposed action is contrary to the objectives set out in:

- Various international treaties set out below;
- Federal legislation including the EPBC Act, the Water Act, the Murray Darling Basin Act and intergovernmental agreements and plans including the National Water Initiative, the Murray Darling Basin Agreement, The Coorong, and Lakes Alexandrina and Albert Ramsar Management Plan and the Living Murray Icon Management Plan;

Prevention, Control and Treatment Options" December 2008;

- Sullivan, L, Burton, R, Watling, K and Bush, M, "Acid, Metal and Nutrient Mobilisations Dynamics in Response to Suspension of MBOs in Freshwater and to Freshwater Inundations of Dried MBO and Sulfuric Materials", Centre of Acid Sulfate Soil research Southern Cross Geoscience, Southern Cross University, Lismore, New South Wales, 2008.

- South Australian legislation and policy including the Development Act, the River Murray Act, the Natural Resource Management Act, the Environment Protection Act, the Water Quality Environment Protection Policy and the National Parks and Wildlife Act.

Further details on the Federal and the South Australian government's obligations under these treaties and legislation follows.

International Treaties

The referral is contrary to the Australian government's obligations under international treaties including:

- the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971 ("Ramsar Convention") which provides that the Federal Government is to:
 - *"promote the conservation of the wetlands"* (in this instance in the vicinity of Lake Alexandrina) (Article 3.1);
 - *"endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna"* (Article 5);
- the following conventions which place obligations on the Federal Government to preserve and enhance the environment of the birds and migratory species listed:
 - the Agreement between the Government of Australia and the Government of the People's Republic of China for the protection of Migratory Birds and their Environment made at Canberra on 20 October 1986 (Article IV);
 - the Agreement between the Government of Japan and the Government of Australia for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment made at Tokyo on 6 February 1974 (Article VI);
 - the Agreement between the Government of Australia and the Government of the Republic of Korea on the protection of Migratory Birds made at Canberra, 6 December 2006 (Article V).

Federal legislation, intergovernmental agreements and management plan

The proposed action is contrary to the obligations set out in the following federal legislation, agreements and plans in that it is contrary to the sustainable management of the environment in the region and is likely to have a significant impact on matters of national environmental significance as set out above. As a result, the proposed action should not be approved or in any event should be declared a controlled action and a proper assessment process should be instituted.

Environment Protection and Biodiversity Conservation Act and Regulations (Cth) 1999

The proposed action is contrary to the positive obligations placed on the Minister to manage the Ramsar listed wetland set out in the EPBC Act and Regulations and so should not be approved. In particular:

- the objects of the EPBC Act provide for:
 - *“the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;*
 - ...
 - *to promote the conservation of biodiversity;*
 - ...
 - *to assist in the co-operative implementation of Australia’s international environmental responsibilities.”*⁹
- section 333(2) of the Act provides that *“the Commonwealth must use its best endeavours to ensure a plan for managing the wetland in a way that is not inconsistent with Australia’s obligations under the Ramsar Convention or the Australian Ramsar management principles is prepared and implemented in co-operation with the State.”*
- section 334 of the Act provides that the *“Commonwealth and each Commonwealth agency must take all reasonable steps to ensure it exercises its powers and performs its functions in relation to the wetland in a way that is not inconsistent with:*
 - (a) the Ramsar Convention; and*
 - (b) the Australian Ramsar management principles; and*
 - (c) any management plan produced under section 333 of the EPBC Act.*
- the Australian Ramsar management principles set out in Regulation 10.02 & Schedule 6 of the EPBC Regulations provide that:

“1.01 The primary purpose of management of a declared Ramsar wetland must be, in accordance with the Ramsar Convention:

 - (a) to describe and **maintain the ecological character of the wetland;** and*
 - (b) to formulate and implement planning that promotes:*
 - (i) **conservation of the wetland;** and*
 - (ii) **wise and sustainable use of the wetland** for the benefit of humanity in a way that is compatible with maintenance of the natural properties of the ecosystem.”* (emphasis added)
- The Coorong, and Lakes Alexandrina and Albert Ramsar Management Plan 2000 provides the following Objectives and Strategies:

⁹ Section 3 EPBC Act

- “Ensure that future government legislation, strategies and policies that affect the region are consistent with the Ramsar principle of wise use and Australia’s obligation for the maintenance of the ecological character of the area.” (Objective 1, Strategy 1.3)
- “Integrate the Ramsar principles of **wise use** and Australia’s obligation for the **maintenance of the ecological character** of the area into the maintenance, operational and capital works programs of relevant agencies.” (Objective 3, Strategy 3.1)
- “Protection of the full range of wetland habitats and restoration of degraded habitats in the Ramsar area and their conservation for future generations.” (Objective 4)
- “Promote property management techniques which **increase the diversity of lake edge vegetation, reduce erosion and increase the amount of indigenous woody vegetation around the lake edges.**” (Objective 4, Strategy 4.4) (emphasis added)
- “Introduce consistent planning controls to protect wetland habitats in the floodplain.” (Objective 4.7)
- “Ensure the councils of Alexandrina, Murray Bridge and Coorong cooperate with Planning SA and [Department for Environment and Heritage] to amend the Development Plan by introducing consistent planning controls in the floodplain **which protect wetland habitats from inappropriate development, and implement the Planning Strategy ...**” (Objective 4, Strategy 4.7, Action 4.7.1) (emphasis added)
- “Reduce all polluting discharges into the River Murray, Coorong and Lower Lakes.” (Objective 5, Strategy 5.5)

Water Act (Cth) 2007

The proposed action is contrary to the objects of the Water Act which include the intent to give effect to international agreements as set out above and:

s3(b)“... to give effect to relevant international agreements and, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources;

*(c) to promote the use and management of the Basin water resources in a way that optimises economic, social and **environmental** outcomes” (emphasis added).*

Given the significant impact caused by the regulators as set out above, the proposal should be referred to the Murray Darling Basin Authority for assessment.

Murray-Darling Basin Act

The Murray-Darling Basin Act gives the force of law to the Murray Darling Basin Agreement, the most relevant terms of which are set out below.

Murray-Darling Basin Agreement

The proposed action is contrary to the following objectives and obligations in the Murray Darling Basin Agreement (entered into by the Commonwealth, New South Wales, Victoria and South Australia):

- the purpose of the Agreement set out in Clause 1 is to “*promote and coordinate effective planning and management for the equitable efficient and **sustainable** use of the water, land and other environmental resources of the Murray-Darling Basin.*” (emphasis added);
- the Ministerial Council and the Commission set up by the Agreement must carry out the purpose set out in clause 1 (clause 8(3), clause 9 and clause 17);
- in exercising its powers, the Commission must take into account an environmental assessment of the exercise of its powers (clause 47).

National Water Initiative

The proposed action is contrary to the National Water Initiative where the contracting parties (which include the Federal and South Australian governments) acknowledge the need to ensure the health of river systems and the use of water in an environmentally sustainable manner.

Living Murray Icon Site Management Plan

The Murray-Darling Basin Ministerial Council has set up Icon Sites due to the declining health of the River Murray.

The proposed action is contrary to the Icon Site Management Plan which sets out the Vision for the region as including:

“Conservation of the Lower Lakes Ramsar Wetlands by incorporating world’s best practice in integrated natural resources management to:

- *Conserve the environmental and ecological attributes of the wetlands for the benefit of future generations;*
- *Improve water quality and increase flows through wetlands;*

- *Fulfill Australia's obligations under the Ramsar Convention and other international agreements.*¹⁰

Further, as the proponent notes in the referral¹¹:

- Lake Alexandrina, Lake Albert, the Coorong and the Murray Mouth together form one of the six Living Murray icon sites selected by the Murray Darling Basin Ministerial Council for its high ecological value and wider cultural significance;
- the primary focus of the Living Murray Initiative is on the '**recovery**' of water for the River Murray and the use of that water for the benefit of ecosystems and communities it supports.

Given this and given the significant impact caused by the regulators as set out above, the proposed action should be determined to be a controlled action to be assessed by in the very best an environmental impact statement so that thorough assessment can take place.

State Legislation, Policy and Local Government Development Plan

The proposed action is contrary to the obligations set out in the following South Australian legislation, agreements and plans in that it is contrary to the sustainable management of the environment in the region and is likely to have a significant impact on matters of national environmental significance as set out above. As a result, the proposed action should not be approved or in any event should be declared a controlled action and a proper assessment process should be instituted.

Development Act (SA) 1993

The proponent maintains its claim for an exemption from the usual procedures under the Development Act by virtue of the operation of regulation 67 and schedule 14 of the Development Regulations. Such an exemption is not justifiable.

Schedule 14 clause 1(d) of the development Regulations provide that:

"The following forms of development... are excluded from the provisions of section 49 of the Act:

...

- (d) *the undertaking of any temporary development which is required in an emergency situation in order to—*
 - (i) *prevent loss of life or injury; or*
 - (ii) *prevent loss or damage to land or buildings; or*
 - (iii) *maintain essential public services; or*
 - (iv) *prevent a health or safety hazard; or*

¹⁰ Icon Site Environmental Management Plan: The Lower Lakes, Coorong and Murray Mouth p12
¹¹ Proponent's Referral p44

- (v) *protect the environment where authority to undertake the development is given by or under another Act”*

If the proponent is claiming the exemption in reliance on this clause (that is, the fact that the development is temporary and that there is an emergency), then this should be reviewed and denied as the regulators cannot be considered temporary if the decommissioning triggers mean that the regulators will be in place indefinitely. Further, the proponent has acknowledged that there is no longer an emergency.

Schedule 14 clause 3 of the Regulations provides:

“The following forms of development are excluded from the provisions of section 49 of the Act, namely the construction, reconstruction, alteration, repair or maintenance of infrastructure within the meaning of the River Murray Act 2003 by the Minister for the River Murray (or by a person who is acting for or on behalf of that Minister) where the work is being undertaken in connection with the management of water flows within the River Murray system, as defined by that Act, for the purposes of the River Murray Act 2003 or the Murray-Darling Basin Act 1993.”

If the proponent is claiming an exemption pursuant to clause 3, such reliance should be reviewed and denied as the action is not one which the Minister can undertake pursuant to section 17(1) of the River Murray Act.

As a result, no approval should be given unless and until approval is given to the proponent under the Development Act.

River Murray Act (SA) 2003

The proposed action is contrary to the objectives of the River Murray Act (SA) 2003 charges the Minister to take care of the River Murray system (which includes the Lower Lakes and Coorong) and the species reliant on it. The key sub-sections are as follows:

s7(2) *“The river health objectives are as follows:*

- (a) the key habitat features in the River Murray system are to be maintained, protected and restored in order to enhance ecological processes;*
- (b) the environments constituted by the River Murray system, with particular reference to high-value floodplains and **wetlands of national and international importance, are to be protected and restored** (emphasis added);*
- (c) the extinction of native species of animal and vegetation associated with the River Murray system is to be prevented;*
- (d) barriers to the migration of native species of animal within the River Murray system are to be avoided or overcome.”*

The proposed action is contrary to the following water quality objectives:

s7(4) *The water quality objectives are as follows:*

(a) water quality within the River Murray system should be improved to a level that sustains the ecological processes, environmental values and productive capacity of the system;

...

(c) nutrient levels within the River Murray system are to be managed so as to minimise other impacts from nutrients on the ecological processes, environmental values and productive capacity of the system;

(d) the impact of potential pollutants, such as sediment and pesticides, on the environments constituted by the River Murray system is to be minimised.

Finally, section 8 of the Act requires the Minister to further the objects of the Act. The proposed action is contrary to the objects and so should not be approved.

Natural Resource Management Act (SA) 2004

As the referral indicates¹², the Natural Resources Management Act is “designed to promote sustainable and integrated management of the State's water resources”. This design is reinforced by the objects and the duties set out in the Act which provide *inter alia* that:

- the Act aims to¹³:
 - assist in the achievement of ecologically sustainable development in the use of the South Australia's natural resources including water;
 - recognise and protect the intrinsic values of natural resources; and
 - “seeks to protect biological diversity and support and encourage the restoration or rehabilitation of ecological systems and processes that have been lost or degraded; and
 - provide for the protection and management of catchments and the sustainable use of land and water resources and, insofar as is reasonably practicable, seeks to enhance and restore or rehabilitate land and water resources that have been degraded...”
- the statutory duty set out in section 9 of the Act provides that “a person must act reasonably in relation to the management of natural resources within the State” and such actions must consider:
 - environmental consequences¹⁴;
 - the nature, extent and duration of any harm¹⁵;
 - the extent to which an act or activity may have a cumulative effect on any

12 Referral p43

13 Natural Resources Management Act, S7

14 Ibid, S9(2)(c)

15 Ibid, S9(2)(d)

natural resources¹⁶;

- the specific statutory duty set out in section 133 with respect to lakes and water courses which provides that:

“it is a duty of the owner of lands [in this case the proponent] on which a lake or watercourse is situated or that adjoins a watercourse or lake to take reasonable measures to prevent damage to the bed and banks of the watercourse of the bed, banks or shores of the lake and to the ecosystems that depend on the watercourse or lake.”

Persons who breach this provision are liable to have civil or criminal action taken against them.

Given that the regulators continue to have a significant impact on the internationally listed Ramsar Wetlands and on the listed threatened species, ecological communities and listed migratory species it is also contrary to the objects and duties set out in the Natural Resources Management Act and so no permit should be granted for the action.

Environment Protection Act (SA) 1993

The Act and its objects aim to protect the environment¹⁷ and this is exemplified by the statutory duty to protect the set out in section 25 of the Act.

The building of the regulators themselves have caused and continue to cause harm to local ecosystems as they stop water flows reaching Lake Alexandrina and Lake Albert and their associated wetlands, contrary to the Environment Protection Act.

Water Quality Environment Protection Policy

The proposed action is contrary to the principal objects and the duties of the Water Quality Environment Protection Policy.

The Principal object of the Policy is to “*achieve the sustainable management of waters*” and particularly “*to promote best practice environmental management*” and “*promote within the community environmental responsibility and involvement in environmental issues*” (subsection 7(1) and 7(2) (d) and (e) of the Policy).

Section 12 of the Policy, which is a mandatory provision, makes it a Category B offence to discharge or deposit:

“a pollutant into any waters, [causing] any of the following:

...

(h) an increase in turbidity or sediment levels.”

The Regulators will cause an increase in sediment levels in Lake Alexandrina and Lake Albert given that they prevent fresh water flowing to them. In these circumstances, no exemption to the Policy should be allowed.

¹⁶ Ibid, S9(2)(g)

¹⁷ S10 Environment Protection Act

National Parks and Wildlife Act (SA) 1972

The proponent seeks an exemption from the National Parks and Wildlife Act so that it can build the regulators. This is contrary to the fundamental operation of the Act, which is that the game reserve is set up to conserve wildlife and manage game such as the migratory species in the region¹⁸. Given this permission should not be given by the Director of National Parks and Wildlife for the works.

ENVIRONMENTAL DEFENDERS OFFICE (SA) INC

¹⁸ S32 National Parks & Wildlife Act (SA) 1972