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in public interest environmental law.*

11 December 2008

The Manager
Referral Business Entry Point
Environment Assessment Branch
Department of Environment, Water, Heritage and the Arts
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By email: epbc.referrals@environment.gov.au

Dear Sir/Madam

REFERRAL 2008/4618
PROJECT TITLE: COORONG AND LAKES ALEXANDRINA AND ALBERT
EMERGENCY MANAGEMENT RESPONSE

EXECUTIVE SUMMARY

The proposed action has unacceptable impacts on matters protected by Part 3 of the Environment Protection Biodiversity Conservation Act ("the EPBC Act"). In addition, the proposed action is contrary to Federal and South Australian government obligations under international conventions and Federal and State legislation and subordinate legislation and policy.

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

If the Minister is not minded to disapprove the proposed action at this point, then the action should be considered a controlled action for the purposes of the Act given the unacceptable impacts on matters protected by Part 3 of the Act as set out above.

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

UNACCEPTABLE IMPACTS

The Lower Lakes have been predominantly freshwater lakes since their formation. The wetlands, ecosystems and species which have grown up around the Lakes rely on that fresh water. The introduction of saltwater into the Lower Lakes is likely to permanently and detrimentally impact those wetlands, ecosystems and species.

In the circumstances, the proposed action should not be approved pursuant to sections 74B and 74C of the EPBC Act on the basis that the proposed action:

- is likely to have unacceptable impacts on matters protected by Part 3 of the Act, that is, the proposed action is likely to have a significant impact on:
 - the ecological character of a declared Ramsar wetland being Lake Alexandrina and Lake Albert (sections 16 and 17B of the EPBC Act).
 - listed threatened species and ecological communities (sections 18 and 18A of the EPBC Act);
 - listed migratory species (sections 20 and 20A of the EPBC Act);
- is contrary to the Australian government's obligations under international treaties such as:
 - the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971 ("Ramsar Convention");
 - 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 done at Canberra on 20 October 1986 ("CAMBA"),
 - 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 done at Tokyo on 6 February 1974 ("JAMBA");
- is contrary to Federal legislation including the Water Act, the Murray Darling Basin Act and intergovernmental agreements including the National Water Initiative, the Murray Darling Basin Agreement and the Living Murray Icon Management Plan and a Report of the Senate Inquiry into Water Management in the Coorong and Lower Lakes;
- is contrary to South Australian legislation and policy and Local Government subordinate legislation 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 local Development Plans;
- obviates other more appropriate means of dealing with acid sulphate soils.

We will detail the last four items as follows:

International Treaty Obligations

Introducing salt water into Lake Alexandrina and Lake Albert is contrary to the government's international obligations under:

- the Ramsar Convention which provides that the Federal Government is to:
 - “*promote the conservation of the wetlands*” (in this instance the Lower Lakes) (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).
- CAMBA and JAMBA which place obligations on the Federal Government to preserve and enhance the environment of the birds and migratory species listed in the conventions (Article IV CAMBA, Article VI JAMBA,).

Federal legislation and intergovernmental agreements

The proposed action is contrary to the obligations set out in the following federal legislation, agreements and plan and so should not be approved or in any event should be declared a controlled action.

Water Act

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 promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes; and

(d) without limiting paragraph (b) or (c):

(i) to ensure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused; and

(ii) to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin (taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity)...”

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 Coorong and Lower Lakes 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.”*

Senate Inquiry into Water Management in the Coorong and Lower Lakes

The Minority Report of the Senate inquiry recommended that “*flooding the Lower Lakes with salt water should not be countenanced as a management option and must be ruled out.*” (http://www.aph.gov.au/Senate/committee/rrat_ctte/lowerlakes_coorong/report/report.pdf Recommendation 1.95 at p81)

State Legislation, Policy and Local Government Development Plan

Development Act

The proposed action is a “development” within the meaning of term in section 4 the Development Act in that the proposed action will result in a change of use of the land.

For their history the Lower Lakes have been predominantly freshwater and the ecosystems, biota and species reliant on the Lakes are predominantly freshwater species. Human (including farming and fishing) use of the Lakes is on the basis that the lakes are freshwater.

The introduction of sea water is likely to cause the demise of such species and a demise of human activities on the Lakes, resulting in the change of use of the land on which the Lakes are situated. This will also mean that the basis upon which the Lakes have been listed under the Ramsar Convention will cease.

Given that the proposed action constitutes development, the proponent is obliged to carry out the approval process set out in the Development Act. This has not occurred and so the proposed action should not be approved unless and until such approval is obtained (if at all).

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, including the Lower Lakes and the species reliant on them. 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 [which includes the Lower Lakes] 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.”*

s7(3) *The environmental flow objectives are as follows:*

(a) *ecologically significant elements of the natural flow regime of the River Murray system are to be reinstated and maintained;*

....

(c) *significant improvements are to be made in the connectivity between and within the environments constituted by the River Murray system.”*

The objectives include a specific mandate to minimise the impact of salinity on ecological processes of the Lower Lakes. The proposed action is directly contrary to these objectives, which are:

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;*

(b) ***the impact of salinity on the ecological processes and productive capacity of 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 not be approved.

Natural Resource Management Act (SA) 2004

The proposed action is contrary to the following objects set out in the Natural Resource Management Act and so should not be approved:

7(1) *“The objects of this Act include to assist in the achievement of ecologically sustainable development in the State by establishing an integrated scheme to promote the use and management of natural resources [including surface water] in a manner that—*

- (a) *recognises and protects the intrinsic values of natural resources; and*
- (b) *seeks to protect biological diversity and, insofar as is reasonably practicable, to support and encourage the restoration or rehabilitation of ecological systems and processes that have been lost or degraded; and*
- (c) *provides 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...*”

Environment Protection Act (SA) 1993

The proposed action is contrary to the objects and duty set out in the Environment Protection Act and so should not be approved.

In its objects in section 10 of the Act, it provides that development and protection of the environment should be managed in way which enables:

- “(A) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and*
 - (B) safeguarding the life-supporting capacity of air, water, land and ecosystems; and*
 - (C) avoiding, remedying or mitigating any adverse effects of activities on the environment;*
- (ii) that proper weight should be given to both long and short term economic, environmental, social and equity considerations in deciding all matters relating to environmental protection, restoration and enhancement.”*

Section 25 of the Act sets out a general environmental duty to refrain from undertaking an activity which might pollute the environment. In this instance, the introduction of salt water into the Lower Lakes, which are fresh to brackish water will pollute the environment.

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:

- (a) loss of seagrass or other native aquatic vegetation; or*
- (b) a reduction in numbers of any native species of aquatic animal or insect; or*
- (c) an increase in numbers of any non-native species of aquatic animal or insect; or*
- (d) a reduction in numbers of aquatic organisms necessary to a healthy aquatic ecosystem....”*

Lake Alexandrina Development Plan

The proposed action is contrary to the following objectives and principals of development control set out in the Lake Alexandrina Development Plan and so should not be allowed:

- “*Maintenance of the water quality of Lake Alexandrina and associated watercourses*” (Objective 3, Waterfront Zone);

- *“Development liable to pollute or contaminate Lake Alexandrina or adjoining watercourse, or affect detrimentally the quality of water near the Miland pumping station should not be undertaken.”* (Principal of Development Control 8 Waterfront Zone);
- *“Protection of the Development liable to cause pollution or contamination of Lake Alexandrina or the lower River Murray, prejudice the conservation of water resources or cause environmental damage should not be undertaken.”* (Principal of Development Control 9 Waterfront Zone).

The Coorong District Council Development Plan

The proposed action is contrary to the following objectives and principals of development control set out in the Coorong District Council Development Plan and so should not be allowed:

- *“Protection of the Coorong, Lake Alexandrina and lake Albert Ramsar Wetlands of International Importance from inappropriate development and land use practices.* (Objective 13 Council-Wide provisions);
- *“Development should not cause wetlands to be destroyed or substantially modified.”* (Principal of Development Control 171);
- *“Development must not seriously disrupt the lifecycle (breeding, feeding, migration or resting behaviours) of an ecologically significant proportion of the population of migratory species.”* (Principal of Development Control 180);
- *“Development of activities should not lead to significant impacts on Ramsar Wetlands...”* (Principal of Development Control 182).

Other Options

The proponent appears to have insufficiently considered other ecologically sustainable options to protect the Lower Lakes from a threat of acid sulphate soils including:

- the release of fresh water into the Lower Lakes. The Minority Report of the Senate Inquiry into Water Management in the Coorong and Lower Lakes recommended that up to 60 gigalitres of fresh water be sourced to maintain the level of the Lower Lakes above the critical acidification threshold.
(http://www.aph.gov.au/Senate/committee/rrat_ctte/lowerlakes_coorong/report/report.pdf Recommendations 1.94 at p81)

South Australia’s Minister for the River Murray, the Honorable Minister Maywald, appeared to agree with the Minority Report on 15 October 2008, at the ‘Water Wednesday Seminar’ at the University of Adelaide when she said that 60 gigalitres of water were to be released from the Murray to the Lower Lakes and Coorong, along with the 350 gigalitres already allocated for the region.

- the use of plants and mulch to rehabilitate exposed acid sulphate soils and rejuvenate the carbon cycle.

Conclusion: Unacceptable Impacts

Given the significant impacts the proposed action is likely to have on internationally protected wetlands and species; given the Federal and South Australian government's obligations to protect these wetlands and species as set out above and given the other options available, the proposed action should not be approved at first instance.

CONTROLLED ACTION

If the Minister is not minded to disapprove the proposed action at this point, then the action should be considered a controlled action for the purposes of the Act given:

- the unacceptable significant impacts on matters protected by Part 3 of the Act as set out above;
- the Federal and State government's obligations to protect these wetlands and species as set out above;
- other options available as set out above.

ASSESSMENT METHOD

If Minister determines that the action is a controlled action, then, given the impacts on the environment are so significant it should be assessed at the highest possible level, that is, by way of the production of an Environmental Impact Statement and the appropriate public consultation.

Recommendation 4 of the Senate Committee report on Water Management in the Coorong and Lower Lakes provided that potential environmental impacts of the admission of seawater into the area should be subject to further detailed investigation (http://www.aph.gov.au/Senate/committee/rrat_ctte/lowerlakes_coorong/report/report.pdf at p60)

ENVIRONMENTAL DEFENDERS OFFICE (SA) INC