



# GREENLAW

MAY 2013

ENVIRONMENTAL DEFENDERS OFFICE (SA) INC

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## New Water Trigger proposed for the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Introduced last month, the *Environment Protection and Biodiversity Conservation Amendment Bill 2013* (CSG Water Bill) is currently before the Australian Parliament. The Bill seeks to amend the *Environment, Protection and Biodiversity Conservation Act 1999* (EPBC Act) by defining a significant impact on water resources of Coal Seam Gas (CSG) mining and large coal mining developments, as a new matter of National Environmental Significance ('water trigger').

The CSG Water Bill is the third in recent times aiming to address the issue of the impacts of mining upon our water. In September 2011 Independent MP Tony Windsor introduced a Bill which would require corporations to obtain Commonwealth approval for any mining activities which may cause significant impacts upon water resources. Of particular note in Windsor's Bill were the terms used and clarity in definition, particularly with regard to 'mining operations' and 'water resources'. In contrast to the CSG Water Bill which specifies only CSG and large coal mining developments, Windsor's Bill referred to 'mining operations' and defined this to include all activities connected with mining (eg: exploration, refining, processing etc). Windsor's Bill also outlined a stringent process and criteria for accredited mining authorisations by the Minister, with the practical effect of preventing activities that are controlled actions for the purpose of the water trigger, from bilateral agreement under the Act.



Residents of Fullerton Cove, Newcastle, blockade a property that Dart Energy was seeking to explore for coal-seam gas.

Picture: Robert McKell.  
Source: *The Australian*

Following the rejection of Windsor's Bill by the House of Representatives, Greens Senator Larissa Waters introduced a separate amendment Bill. Currently before the Senate, the Greens' Bill echoes the intention set by Windsor but does not include the same formal process for authorisations. The Greens' Bill utilises Windsor's language and definitions of 'mining operations' and 'water resources' and specifies various endpoint criteria to be considered, including

water quality, structural integrity and hydraulic balance of a water resource.

The amendments proposed in the CSG Water Bill will not affect existing and proposed projects that have already been approved, authorised, or determined not to constitute a controlled action, or where the Minister has already indicated a decision of this nature to the applicant.

The Australian Network of Environmental Defender's Offices (ANEDO) has made a submission to the Senate Standing Committee on Environment and Communications regarding the EPBC Bill.

ANEDO is very supportive of legislation creating a ninth matter of National Environmental Significance to protect water resources from the effects of mining, but has suggested further amendments on the following Issues of concern.

The water intensive nature of mining activities creates various impacts upon the water resources of Australia, the driest continent on Earth.

From rivers and aquifers left degraded after mining, to the toxic water released into the environment after use in processing, to the potential damage from pit lakes created in abandoned open cut mines: such potentially destructive impacts pose particular concern for arid regions.

Recognising the fact that the effects of mining on water resources extend well beyond CSG activities, ANEDO is of the view

that the scope of the CSG Water Bill should be expanded to include all large mines that excavate below the water table.

ANEDO also proposed limits upon the current exemptions provided for in the CSG Water Bill, specifically, that unapproved or approved but un-commenced projects likely to affect water resources should not be granted an exemption.

The CSG Water Bill also creates scope for additional exemptions. In particular, the water trigger will not apply to projects that may impact water resources if, prior to the commencement of the Bill, the Federal Environment Minister decided the project was not a controlled action with regard to the other eight matters of National Environmental Significance. Also, even where a project has been declared a controlled action and



Network of coal seam gas wells in the Great Artesian basin

has not yet been approved, it may still be exempted if two criteria are met: 1- the Minister has indicated their intended decision with respect to the project, and 2- advice regarding the project has been obtained from the Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development.

The irony of this exemption is that the advice of this body would only be sought if the project was deemed likely to have an impact

on water resources, meaning an exemption could be granted to an unapproved project that will likely impact the water resources.

ANEDO's view is that the constitutional validity of the EPBC Act is highly dependent upon several international treaties to which Australia is a signatory, so it follows that the CSG Water Bill could, and ANEDO recommends that it should, include water trigger specific assessment criteria to 'not act inconsistently with' the relevant treaties.

Finally ANEDO submitted that the CSG Water Bill should provide for bilateral agreements to be amended in accordance with the water trigger.

The passage of the CSG Water Bill may have wide relevance in South Australia. In 2012 the State Government released its 'Road Map for Unconventional Gas Projects'

([http://www.pir.sa.gov.au/\\_data/assets/pdf\\_file/0004/171616/Draft\\_Complete\\_Roadmap.pdf](http://www.pir.sa.gov.au/_data/assets/pdf_file/0004/171616/Draft_Complete_Roadmap.pdf))

This document outlines the Government agenda in relation to the economic benefits of unconventional gas resources. Unconventional gas projects include both CSG projects and shale gas projects.

The feasibility of both of these types of project is currently under investigation in various parts of regional South Australia.

From the already established Moomba gas fields in the Cooper Basin in far north SA, through the Arkaringa coalfields (near Oodnadatta) and the Copley Basin (near Leigh Creek), across to the Lock basin and others around the Eyre Peninsula and the Wakefield region and down to the Kingston

Deposit in the South east of the State, exploration is either underway or proposed to investigate the feasibility of future CSG developments.

However due to the extensive and ongoing nature of such exploration, it would appear that these amendments, though perhaps too little too late for many projects on the east coast of Australia, have the potential to offer substantial protection to our state's water resources.



Hot water bore hole into the Great Artesian Basin in Thargominda—Wikipedia

## The EPA and Planning Matters

The Environment Protection Authority (EPA) is South Australia's prime environmental regulator, with oversight of issues such as air and water quality and the control of pollution, waste, noise and radiation.

The EPA has a crucial role in South Australia's planning system and its role in this area is regulated via provisions in the *Development Act 1993* and *Development Regulations 2008*.

The Planning Review Committee (PRC) was established by the EPA to review its role in the planning system, and the PRC Report was released in February.

There are currently eight EPA staff dedicated to the development assessment function and three to strategy, policy and major development. There are 50 specialist technical officers who provide advice in development applications.

The EPA receives development application referrals and provides advice in relation to specific activities that could impact the environment (such as waste treatment and chemical works). It is obligated to have regard to the *Environment Protection Act 1993* and ensure all reasonable and practicable measures are taken

to protect, restore and enhance the quality of the environment.

An important part of this work is in relation to major developments. The process for assessing these projects is provided for in section 46 of the *Development Act 1993*

Section 46 Major Developments are declared by the Minister for Planning, usually because the project is of such a scale that examination of environmental impacts requires a more detailed investigation. The Department for Planning, Transport and Infrastructure (DPTI) relies on the EPA to coordinate the whole Environment and Conservation Portfolio, while the Development Assessment Commission determines the appropriate level of environmental impact assessment to be carried out.

The PRC Report advocates changing section 46. The section currently provides that a statement of a proposal's ability to meet general environmental duties is only required if the development is a prescribed activity of environmental significance. Hence, if a proposed major development is not such a prescribed activity, no statement is required.

This presents an inconsistent approach since all major develop-

ments will have some environmental impacts and all, not some, of the projects should be required to provide evidence of their ability to meet general environmental duties.

The EDO supports changes to rectify this inconsistency.

The EPA also plays a role in strategic planning and planning policy. For example, the EPA was responsible for adding a new chapter on human health and the environment to the 30 Year Plan for Greater Adelaide. The PRC Report recommends however that there be earlier engagement by the EPA in planning strategy and structure plan preparation.

A further concern raised in the PRC Report is in the area of site contamination, in particular how it fits in the planning system. It was noted that there are no consistent, and clear processes in this area. The EDO is of the view that urgent policy and law reform is needed in this regard.

The Planning Review Committee Report on the EPA can be found at:

[http://www.epa.sa.gov.au/xstd\\_files/Industry/Report/planning\\_review.pdf](http://www.epa.sa.gov.au/xstd_files/Industry/Report/planning_review.pdf)

## SA Government Planning Improvement Project and the EDO's Planning Seminar

Earlier this year the State Government established an Expert Panel on Planning Reform chaired by Brian Hayes QC. The purpose of the Panel is to review the State's planning system and in particular the *Development Act 1993* with a view to providing a final report with recommendations by December 2014. As part of this task the Panel will examine interstate and overseas planning systems and legislation together with relevant reports and research.

The Panel will also be consulting the community and one initiative in this respect has been the establishment of a Planning Reform Reference Group to be chaired by Michael Llewellyn-Smith. The EDO has accepted an invitation to be a member of this Group.

The EDO is also holding a day seminar later in the year to examine certain aspects of the Act which has been operating for nearly 20 years. We welcome participants from all parts of the community to help us develop a list of recommendations for consideration by the Expert Panel. Please keep an eye on our website, Facebook page or eBulletin for more information.

### New EDO staff member: Lucy Moschos, Solicitor

My name is Lucy Moschos. In 2010 whilst studying law at Adelaide University, I began volunteering with the EDO. Over a couple of years I assisted with research on numerous client matters as well as the 2011 Biodiversity Report. I was recently admitted as a legal practitioner in South Australia and am now thrilled to join the EDO as a staff solicitor. I look forward to being much more involved in the invaluable work of the organisation.



### ENVIRONMENTAL LAW VOLUNTEER ADVISORY SERVICE

The Environmental Defenders Office invites lawyers with environmental law experience and who have an unrestricted practicing certificate to offer their services, free of charge, at the EDO Advisory Service on a Thursday evening.

Rostered environmental lawyers generally attend the EDO 3-4 times per year to advise clients face to face on their legal rights regarding a range of environmental and planning issues.

Please contact the EDO if you are able to assist by phoning 8410 3833 or emailing [edosa@edo.org.au](mailto:edosa@edo.org.au)

## Changes to the *Wilderness Protection Act 1992*

The South Australian Parliament recently passed the *Wilderness Protection (Miscellaneous) Amendment Act 2013*. The amendments include adding certain prohibited activities that may not be undertaken without a licence, as well as other conditions relating to the granting of licences in protection zones. The new prohibited activities include conducting scientific experiments and activities of any kind for the purpose of fundraising or making a profit.

A further significant change was the insertion of a division for the co-management of wilderness protection areas and zones. The aim of this scheme is to recognise the significance of wilderness parks to the aboriginal people and acknowledge their connection and involvement in management. A co-management agreement can now be entered into for a wilderness protection area with a co-management board that can be set up to oversee that zone. Further, any proclamations relating to the constitution of wilderness protection areas or the prohibition of activities in the protected areas are now subject to co-management agreements.

## Recent cases in the Environment, Resources and Development Court

### Reserving matters? *Royal Zoological Society of South Australia Inc v The Rural City of Murray Bridge & Anor* [2013] SAERDC 2 (21 January 2013)

The ability to reserve matters under the power conferred by section 33 of the *Development Act* (SA) 1993 has been clarified in this recent case. The Royal Zoological Society lodged an appeal against the Murray Bridge Council decision to grant consent to the development of a motor racing facility within close proximity of the Monarto Zoo (operated by the Zoological Society).

Of particular concern to the appellants was the predicted large volume of traffic on race days for which there was no traffic management plan in place and which would be likely to affect the entrance to the Monarto Zoo. In her decision Judge Cole considered whether the Council had gone beyond the power of reservation, in particular whether the Council could lawfully grant development plan consent while reserving a decision on a specified matter. There were three reserved matters of which only one and two were challenged, the third matter was conceded to have been properly reserved.

Judge Cole determined that the first matter regarding a road upgrade was properly reserved, but that the second matter of traffic management in and out of the site was a matter fundamental to the planning of the development and therefore should not have been reserved. Her Honour made particular reference to the fact that no traffic management plan had been proposed upon which third parties could comment about impact, and that the grant of approval meant there would be no provision for future input by affected parties in the future.



### Right to a View? - *Noble & Ors v City of Holdfast* [2013] SAERDC 5 (30 January 2013)

In this case a number of residents appealed against council approval of a council proposal for shade structures on adjoining parks. This case is significant in that the same Council has numerous similar proposals afoot, regarding children's playgrounds, motivated by sun safety awareness for the users of these public spaces.

Commissioner Green was of the view that the proposal in question did not sufficiently meet numerous Development Plan guidelines. In particular, he was concerned with the significant negative effect on visual amenity likely to be experienced by residents and owners of residential dwellings adjacent to the parks. In his decision the Commissioner makes it clear there is 'no right to a view' however in this case he considered the impacts on private views and amenity were significant enough to warrant allowing the appeal.



***Motor racing and zoo animals - can these two coexist ?***



## Cuttlefish given legal protection

On the 28 March the Giant Australian Cuttlefish (*Sepia apama*) received formal protection by way of a temporary fishing closure around Point Lowly in the Upper Spencer Gulf. This area is the prime breeding ground for this iconic species.

The closure will be in force for 12 months and is subject to review. Any cuttlefish inadvertently caught within this area must be carefully and immediately returned to the water. Under the *Fisheries Management Act 2007 (SA)* the Minister for Fisheries has extensive powers to enforce the closure and the protection of the species. The move was originally sparked by a 90% decline in numbers of the species, the reasons for which are not as yet fully understood.



## EDO STALL AT THE COURTS OPEN DAY

A key event in LAW WEEK is the free Courts Open Day, which takes place at the landmark Sir Samuel Way Building, Victoria Square, on **Saturday 11 May**, from 10am to 3pm. *While you are there, why not come and visit us at the EDO stall?*

## Proposed changes to the Development Plan Amendment Process

On 19 September 2012 the Greens introduced a Bill into State Parliament seeking to change the way in which interim operation of development plan amendment (DPA) occurs.

Currently, section 28 of the *Development Act 1993* provides that the Planning Minister can declare operation on an interim basis at the same time that the proposed amendment is released for public consultation. When this occurs, development applications can be lodged and assessed against the DPA even if the amendment is later abandoned.

The Bill seeks to ensure that the interim operation is used “in the interests of the orderly development of the state”, and not as a fast-tracking tool to be used without regard to proper planning principles.

The Bill also requires that any applications for development consent which are relevant to a

DPA in interim operation are assessed against the development plan provisions that were in place immediately before the DPA was made as well as the provisions after the DPA was made. If the decision to grant consent would differ between the two assessments, consent cannot be given until the DPA is no longer in interim operation.

A second Bill in relation to DPA was introduced by the Greens into State Parliament on the 10 April 2013.

This Bill relates to notification of a DPA. The Bill proposes that the relevant authority be obliged ‘to take reasonable steps’ (to be defined by the Regulations) to notify people who are directly affected by a DPA. Currently, the relevant authority is only obliged to put a notice in the Government Gazette and in a newspaper. However, many people do not regularly read the Government Gazette or scan through the public notices

section of a newspaper. This means that people may often have their land rezoned without their knowledge.

The Bill proposes that where a DPA is released for public consultation (whether by the government or the local council) the relevant authority must take reasonable steps to notify owners and occupiers of land directly affected by the operation of the proposed amendment that the affected parties have the right to make representations in relation to the proposed DPA in writing and at a public meeting held in accordance with *Development Act 1993* provisions.

The proposed changes would not apply to a Statewide DPA as this would create a too onerous notification task.

The EDO supports these Bills as they seek to make positive improvements to genuine public engagement in the South Australian planning system.

## Development on the Eyre Peninsula – the Port Spencer proposal

The proposal for a deep water port on the Eyre Peninsula has advanced to the next stage of approval. The Centrex Metals Ltd proposal would see iron ore exported from a number of iron projects along the Eyre Peninsula. A 515m jetty would be built to load up to 2 million tonnes in iron ore and grain a year. Iron Road Ltd also has sought project approval to build a port in the same area between Tumby Bay and Port Neill. However the government has stated that only one port will be built, adding that it will be a multi-user facility.

The project, was classified as a major development and underwent environmental impact assessment conducted by Golder Associates. The public environmental report (PER) is available at:

<http://www.sa.gov.au/subject/Housing%2C+property+and+land/Building+and+development/Building+and+development+appli>

[cationsMajor+development+applications+and+assessments/Major+development+proposals/Sheep+Hill+deep+water+port+facility+%28Stage+1%29+on+Eyre+Peninsula](#)

The PER assessed potential impacts on the marine and coastal environment as well as the traffic and road network. The PER concluded that construction is expected to only affect the immediate area around the port, with jetty shading and the possible introduction of pest species from international ships being the two major impacts.

It is proposed that marine as well as terrestrial areas will be revegetated to offset the clearance needed for the construction.

One concern addressed in the PER is the risk of an oil or chemical spill occurring in the gulf. The PER considered that most spills occur due to ships grounding as a result of high seas, poor weather conditions or uncharted reefs.

The PER concluded that the shipping lane and general area pose a low risk of oil or chemical spills. Similarly, the PER concluded that the risk of soil contamination as a result of chemical handling and storage onsite as well as wastewater treatment was low.

Last December the first stage of the project received approval from the State government. The approval is subject to conditions which keep the project within the ambit of the PER and approvals from engineers, with the discretion to cancel the project delegated to the South Australian Minister for Planning.

The project will require further approval from the State and Commonwealth governments before it can proceed. The EDO is advising a number of community members who continue to remain concerned about the potential environmental impacts of the proposal. In particular there is concern that the impacts could be much wider than described in the PER. Lipson Island Conservation Park lies about 1km south of the proposed port and is home to a fairy penguin colony and various bird species. The concern is that the development could lead to a land bridge forming across to the Island thereby allowing predators across .



Proposed Port Facility at Port Spencer.

Photo:

Golder Associates

## Private Certifiers and Planning Approvals

As of 11 April 2013 registered private certifiers are able to undertake planning assessments of residential code developments and grant planning consent in relation to such development. An auditing regime has been included to ensure that processes and procedures applied by the private certifiers comply with the *Development Act 1993*. Additionally, certifiers will be required to provide notification of any variations of plans or other documentation and to maintain a register.

# Contact Us

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## Newsletter Images:

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If you are happy to receive this newsletter by email please contact Gabrielle Bond at: [edosa@edo.org.au](mailto:edosa@edo.org.au)



## EDO Management Committee

Chairperson: Christine Trenorden

Peter Burdon	Richard Cook	Angela Davison
Duncan Hartshorne	Tiana Nairn	Felicity Niemann
Eliza Northrop	Patricia von Baumgarten	Claire Williams

EDO solicitors run an Outreach Program with visits to regional centres within South Australia. There are up to four outreach visits each year, where EDO solicitors provide free legal advice to community groups and individuals on all aspects of environmental law. For information on future outreach sessions, please contact the Environmental Defenders Office.

## EDO SUBSCRIPTION

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ENVIRONMENTAL DEFENDERS OFFICE (SA) INC MEMBERSHIP FORM

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I enclose my annual fee of \$44.00

\$22.00 – concession

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All memberships expire on 30<sup>th</sup> June 2014

The information contained in this newsletter is not a substitute for proper legal advice. Contact the EDO or your solicitor for more detailed legal advice if you have a specific problem on an environmental law issue.