



3. Assessment and approval process

This chapter provides an overview of planning and statutory framework. It outlines the approval process under Part 3A of the NSW Environmental Planning and Assessment Act 1979 and the Director-General's requirements the Environmental Assessment has been prepared to address. It also discusses the applicability of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999.

3.1 Environmental Planning and Assessment Act, 1979

The *Environmental Planning and Assessment Act 1979* (EP&A Act) forms the statutory framework for planning approval and environmental assessment in NSW. Implementation of the EP&A Act is the responsibility of the Minister for Planning, statutory authorities and local councils.

The EP&A Act contains three schemes that impose requirements for planning approval:

- ▶ Part 3A provides for control of 'major projects' that require approval from the Minister for Planning;
- ▶ Part 4 provides for control of 'local development' that requires development consent from the local Council; and
- ▶ Part 5 provides for control of 'activities' that do not require approval or development consent under Part 3A or Part 4.

The need or otherwise for development consent is set out in environmental planning instruments – State Environmental Planning Policies (SEPPs), Regional Environmental Plans (REPs), or Local Environmental Plans (LEPs).

As outlined in Section 3.1.3, the project does not require consent as it is subject to Division 24 of SEPP Infrastructure and the Murray Regional Environmental Plan No. 2.

3.1.1 Application of Part 3A of the EP&A Act

Section 75B(1) of the EP&A Act defines projects to which Part 3A applies and states that:

This Part applies to the carrying out of development that is declared under this section to be a project to which this Part applies:

- (a) *by a State environmental planning policy, or*
- (b) *by order of the Minister published in the Gazette (including by an order that amends such a policy).*

The carrying out of particular or a class of development, or development for a program or plan of works or activities, may be so declared.



On 29 July 2005, the Minister for Planning issued an Order under Section 75B(1) in NSW Government Gazette (No. 96) that provided:

“ORDERS

I, the Minister for Infrastructure and Planning, declare under Section 75B(1) of the Environmental Planning and Assessment Act 1979, that the following developments are projects to which Part 3A applies.

DEVELOPMENT TO WHICH PART 3A APPLIES

Development that is an activity for which the proponent (that is not a local council or county council) is also the determining authority and that, in the opinion of the proponent, would (but for this order) require an environmental impact statement to be obtained under Part 5.

The terms “activity” “determining authority” and “proponent” have the same meaning as in Part 5 of the Environmental Planning and Assessment Act, 1979.”

The project is subject to Part 3A because it is consistent with the Minister's declaration under Section 75B(1)(b) in that:

- It is defined as an activity, as the project is permissible without development consent (refer to Section 3.1.3);
- NOW and Forests NSW would be the determining authority and pursuant to section 110B(1) EP&A Act also the proponent; and
- NOW and Forests NSW are of the opinion that there is the potential for there to be a significant impact and an Environmental Impact Statement would be required if it was assessed under Part 5 of the EP&A Act. During operation, the project is predicted to achieve a net environmental benefit.

The Department of Planning has confirmed that Part 3A of the EP&A Act is the applicable statutory approval process for the project and that the Minister for Planning is the approval authority.

An Environmental Assessment is required to support the application for Project Approval. A Preliminary Environmental Assessment was prepared to initiate the Part 3A process and was submitted as part of the Project Application and request for the Director-General's Requirements (DGR).

According to Section 75R(3) of the EP&A Act, for projects declared to be a project to which Part 3A applies, the Minister may declare that only State environmental planning polices apply.

Section 75U(1) of the EP&A Act specifies certain authorisations which are not required for an 'approved project' under Part 3A, namely:

‘(a) the concurrence under Part 3 of the Coastal Protection Act 1979 of the Minister administering that Part of the Act,

(b) a permit under section 201, 205 or 219 of the Fisheries Management Act 1994,

(c) an approval under Part 4, or an excavation permit under section 139, of the Heritage Act 1977,



- (d) a permit under section 87 or a consent under section 90 of the National Parks and Wildlife Act 1974,
- (e) an authorisation referred to in section 12 of the Native Vegetation Act 2003 (or under any Act to be repealed by that Act) to clear native vegetation,
- (f) a permit under Part 3A of the Rivers and Foreshores Improvement Act 1948,
- (g) a bush fire safety authority under section 100B of the Rural Fires Act 1997,
- (h) a water use approval under section 89, a water management work approval under section 90 or an activity approval under section 91 of the Water Management Act 2000.'

Section 75A defines 'approved project' as 'a project to the extent that it is approved by the Minister under this Part, but does not include a project for which only approval for a concept plan has been given'. Consequently, these approvals would not be required if the Minister grants project approval to carry out the project under Part 3A.

Under Section 75V(1) of the EP&A Act, the following authorisations cannot be refused if necessary for the carrying out of an 'approved project' and are to be substantially consistent with an approval to carry out the project given under Part 3A:

- ▶ An environment protection licence under Chapter 3 of the Protection of the Environment Operations Act 1997; and
- ▶ A consent under s138 of the Roads Act 1993.

3.1.2 Director-General's requirements

The Director-General's requirements for the project were issued on 22 May 2009 and are summarised in Table 3-1, along with a reference to where they are addressed in the Environmental Assessment. The complete Director-General's requirements are included in Appendix A.

Table 3-1 Director-General's requirements

Requirement	Where addressed
General requirements	
Executive summary	Executive summary
Detailed description of the project including <ul style="list-style-type: none"> ▶ construction and operation details, including a timeline for construction works and the operating sequence of the project; and ▶ Identify the location and dimensions of all project components including construction compounds and access roads. 	Chapter 6
Consideration of any relevant statutory provisions Describe the consistency of the project with the objects of the <i>Environmental Planning and Assessment Act 1979</i> and the <i>Environmental Protection and Biodiversity Conservation Act 1999</i> .	Chapter 3
Assessment of the key issues	Chapters 8 - 14



Requirement	Where addressed
Draft Statement of Commitments detailing measures for environmental mitigation, management and monitoring for the project	Chapter 15
Conclusion justifying the project, taking into account environmental, social and economic impacts; site sustainability and public interests.	Chapter 16
Certification by the author	
Key assessment requirements	
Strategic planning and justification:	Chapter 5
<ul style="list-style-type: none"> ■ Determine the project need; scale; scope and location. Specific reference must be made to the MDB Ministerial Council's <i>Living Murray Initiative</i>; ■ Describe how the scheme would achieve the <i>First Step Objective</i> to <i>maintain and restore a mosaic of healthy floodplain communities</i>; ■ Provide an overview of the relationship between the project and its relevance to the remaining five Icon Sites; and ■ Define how the project would respond to concerns about the environmental and economic health. 	
Ecological impacts	Chapter 8
<ul style="list-style-type: none"> ■ Assess the impacts to flora and fauna, particularly critical habitats, threatened species, populations, ecological communities and their habitats, including those listed under the <i>Threatened Species Conservation Act 1995</i> and the <i>Fisheries Management Act 1997</i>. <p>The assessment should be undertaken in accordance with the <i>Draft Guidelines for Threatened Species Assessment</i> (July 2005) and include:</p> <ul style="list-style-type: none"> ■ Direct and indirect impacts to fish and macro-invertebrate movements in the Murray and associated waterways and consideration of the impacts of different levels of water supply and impacts on aquatic habitats; ■ Impacts to terrestrial flora and fauna as a result of proposed increased water flows in the Koondrook-Perricoota Forest in the distribution of riparian habitats; ■ A map quantifying vegetation communities to be affected/improved by the project; and ■ A description of measures to avoid, mitigate and offset impacts consistent with "improve or maintain" principals, demonstrating the availability of viable and achievable options to offset the impacts of the project. 	



Requirement	Where addressed
Hydrology impacts	Chapter 9
<ul style="list-style-type: none"> Outline how the works operating under the proposed flooding regime would affect the natural physical, chemical and biological processes of the Koondrook-Perricoota Forest Wetland; Include a comparison between the hydrograph of natural floods that reach RL 78.5 on the floodplain and the hydrograph of the inundation to be generated by the proposed works in terms of frequency and duration; Provide a clear description of flooding regimes introduced by the project compared to conditions experienced during a natural flood; and Assess impact of changed flooding regime on surrounding land use. 	
Water quality and soil impacts	Chapters 10 and 11
<ul style="list-style-type: none"> Assess impacts to water quality during construction and operation, detailing how erosion and sedimentation would be managed and riparian vegetation protected during construction and operation of the project; Identify the type, quantity and location of chemicals to be stored on site(s) and measures for spill management (e.g. bunding and emergency procedures); Assess soil quality, in particular the potential disturbance and subsequent management of Acid Sulfate Soils and Potential Acid Sulfate Soils during construction; Assess the potential for salinisation of the River Murray and associated waterways during operation; and Comment on the implications on the productivity of the Murray River and any necessary mitigation or management measures. 	
Indigenous heritage impacts	Chapter 13
<ul style="list-style-type: none"> Assessment of the potential impact of the project on indigenous heritage values – both archaeological and cultural; Demonstrate effective communication and consultation with indigenous stakeholders during the assessment and in developing mitigation options; and Detailed final recommendation measures consistent with <i>Guidelines for Aboriginal Cultural Impact Assessment and Community Consultation</i> (DEC, July 2005). 	
Spoil and waste management impacts	Chapter 14
<ul style="list-style-type: none"> Estimation of the likely spoil generation and types including any known or potential contamination sites; and Identify disposal /recycling sites and management of all types of waste material. 	



Requirement	Where addressed
General environmental risk analysis	Chapter 7
<ul style="list-style-type: none"> ▮ Inclusion of an Environmental Risk Analysis identifying potential environmental impacts associated with the project, proposed mitigation measures and potentially significant residual environmental impacts after the application of proposed mitigation measures; and ▮ An appropriately detailed impact assessment of the additional key environmental impacts must be included in the Environmental Assessment. 	
An appropriate and justified level of consultation must be undertaken with the following parties during the preparation of the Environmental Assessment:	Chapter 4
<ul style="list-style-type: none"> ▮ Wakool Shire Council; ▮ Murray Shire Council; ▮ Murray Catchment Management Authority; ▮ Department of Environment and Climate Change; ▮ Department of Environment, Water, Heritage and the Arts; ▮ Department of Primary Industries; ▮ Department of Water and Energy; ▮ Department of Sustainability and Environment (Victoria); ▮ Department of Lands; ▮ Murray-Darling Basin Authority; ▮ South Australian Murray-Darling Basin Natural Resources Management Board; and ▮ Local community and landowners. 	

3.1.3 Objectives of the Environmental Planning and Assessment Act 1979

Table 3-2 outlines how the project would meet the objectives of the EP&A Act.

Table 3-2 Justification of the project against the objectives of the EP&A Act.

EP&A Act	Project
(a) to encourage:	
(i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.	The purpose of the project is to improve the ecological health of the Forest which is an important natural resource that is of significance to the social and economic welfare of the community. It is therefore considered to be consistent with this objective.
(ii) The promotion and coordination of the orderly and economic use and development of land.	The project would be operated in accordance with an Operating Plan that would involve implementation of strategies to minimise adverse impacts associated with the economic use of the Forest.



EP&A Act	Project
(iii) The protection, provision and coordination of communication and utility services.	The project does not involve provision of communication or utility services.
(iv) The provision of land for public purposes.	The project itself is a public purpose as it would improve the ecological health of the Forest which is used by the public for a range of purposes.
(v) The provision and coordination of community services and facilities.	A section of the downstream levee would be along the alignment of an existing levee that provides Barham with flood protection. Co-location of these levees is consistent with this objective.
(vi) The protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.	The purpose of the project is to improve the ecological health of the Forest. Adverse impacts on native animals and plants, including threatened species, populations and ecological communities, and their habitats have been assessed and mitigative strategies would be implemented. An offset strategy has been developed in consultation with DECCW to ensure that the project delivers an 'improve or maintain' outcomes from an ecological perspective.
(vii) Ecologically sustainable development.	The Environment Assessment has assessed the values of the environment and aligned management of the impacts to these values with the principles of ecologically sustainable development. Chapter 16 outlines how the project is consistent with the objectives of ecologically sustainable development.
(viii) The provision and maintenance of affordable housing.	The project would be unlikely to adversely impact on or influence the provision or maintenance of affordable housing in the area.
(b) To promote the sharing of the responsibility for environmental planning between the different levels of government in the State.	The project would be assessed and approved by the NSW Minister for Planning under Part 3A of the EP&A Act.
(c) To provide increased opportunity for public involvement and participation in environmental planning and assessment.	The development of the project has included community involvement as described in Chapter 4.

3.2 State environmental planning policies

Under recent amendments to the NSW planning system, as of 1 July 2009 regional environmental plans (REPs) are no longer part of the hierarchy of environmental planning instruments in NSW. The removal of the REP layer is intended to simplify the State's planning system.

Some REP's have been repealed, and those that remain are deemed to be State environmental planning policies (SEPPs) under the new Division 2, Part 3 of the EP&A Act.

The following section outlines SEPPs, and REPs deemed to be SEPPs, that are potentially relevant to the project.



3.2.1 State Environmental Planning Policy – Infrastructure

State Environmental Planning Policy (Infrastructure) 2007 (ISEPP) aims to assist in the effective delivery of public infrastructure in the State by improving certainty and regulatory efficiency through a consistent planning assessment and approvals regime for public infrastructure and services across NSW. ISEPP provides clear definition of the Environmental Assessment and approval process for public infrastructure and services facilities.

Division 24 relates to water supply systems and Clause 124 contains the following definitions:

water reticulation system means a facility for the transport of water, including pipes, tunnels, canals, bores, pumping stations, related electricity infrastructure, dosing facilities and water supply reservoirs.

water storage facility means a dam, weir or reservoir for the collection and storage of water, and includes associated monitoring or gauging equipment.

water supply system means a water reticulation system, water storage facility, water treatment facility, or any combination of these.

The project would involve channels (canals) that would transport water and so would meet the definition of a water reticulation system. It would also store water and so would meet the definition of a water storage facility. The project is considered to be a water supply system as it is a combination of water reticulation system and water storage system.

Under Clause 125(1), *development for the purpose of water reticulation systems may be carried out by or on behalf of a public authority without consent on any land.* As such, the channels are permissible without consent.

Under Clause 125(2), *development for the purpose of water storage facilities, including development for any of the following purposes, may be carried out by or on behalf of a public authority without consent on land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone SP1 Special Activities, Zone SP2 Infrastructure or an equivalent land use zone:*

- (a) *catchment management works,*
- (b) *public recreational facilities associated with a water storage facility.*

The project would involve development for the purpose of water storage facilities on land that is zoned 1(f) under the Murray LEP, and 1(a) and 1(f) Wakool LEP. While zone 1(a) in the Wakool LEP is equivalent to Zone RU1 Primary Production, zone 1(f) in the two LEPs is not equivalent to Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone SP1 Special Activities, Zone SP2 Infrastructure. As such, the water storage facility would not be permissible without consent.

Based on the above, those components of the project relating to the water reticulation system would be permissible without consent. As detailed in Section 3.2.2, the Murray Regional Environmental Plan No. 2 (MREP) contains provisions that do not conflict with ISEPP and enable the whole project to be undertaken without consent.

Under Section 75B(3) of the EP&A Act, if only part of any development is a project to which Part 3A applies, the other parts of the development are taken to be a project to which Part 3A



applies. The part of the project relating to the water reticulation system is subject to Part 3A as it would be permissible without consent and an EIS would be required if it is assessed under Part 5 (refer to Section 3.1.1). As a result, application of Section 75B(3) of the EP&A Act means that other parts of the project, such as the water storage system, are also subject to assessment under Part 3A of the EP&A Act.

3.2.2 Murray Regional Environmental Plan No. 2 – Riverine Land

The project would be undertaken on land that is subject to the Murray Regional Environmental Plan No. 2 (MREP). The objectives of MREP are:

- ▶ To ensure that appropriate consideration is given to development with the potential to adversely affect the riverine environment of the River Murray, and
- ▶ To establish a consistent and co-ordinated approach to environmental planning and assessment along the River Murray, and
- ▶ To conserve and promote the better management of the natural and cultural heritage values of the riverine environment of the River Murray.

The project is considered to be consistent with the objectives of MREP as it would enhance the flood regime to improve the ecological health of a large proportion of the Forest. This would promote the natural values of the riverine environment of the River Murray.

Under the MREP, the 'Murray River' means the waters of the main channel of the Murray River and its bed and banks. The 'River Murray' means the Murray River, the waters and the bed and banks of its tributaries and associated water bodies (including related anabranches, creeks, lagoons, lakes, billabongs and wetlands).

The following section outlines relevant requirements arising from the MREP. In summary, the works do not require consent.

Clause 13 – Planning control and consultation table

Under Clause 13, the project may be described as 'bed and/or bank work'. The following sections outline the consent and consultation requirements.

Clause 13(3) - Bed and/or bank work

Bed and/or bank work is defined as:

Works which relate to the excavation, dredging or alteration to the alignment or shape of the bank or bed of the River Murray (including construction of weirs and floodgates, boat ramps and bank stabilisation works).

As the project involves excavation of the bed and/or bank of the River Murray, as well as installation of floodgates and bank stabilisation works, it meets the definition of bed and/or bank works.

Planning controls for bed and/or bank works are:

- ▶ Council consent (except work by or for Department of Water Resources (DWR) (now known as NOW) or Rural Water Commission (RWC) (Vic).
- ▶ Advertised (except work by or for DWR or RWC).



As the project would be undertaken by NOW which exercises the function of the former DWR, Council consent is not required.

Consultation is required to be undertaken with:

- NOW - referred to as DWR in MREP;
- DECCW - referred to as Environment Protection Authority (EPA) in MREP;
- MDBA – referred to as MDBC in MREP;
- NSW Maritime – referred to as Maritime Services Board (MSB) in MREP;
- Department of Industry and Investment – referred to as NSW Fisheries in MREP; and
- Department of Sustainability and Environment – referred to as C&NR in MREP (Vic).

Clause 12 – general provisions for consultation

Clause 12(1) defines the general provisions for consultation and states that:

- a) *Where development is contrary to the aims, objectives or principles of this plan and may have a significant environmental effect along the Murray River—the P&D (Vic), C&NR (Vic) and the adjacent local Council in Victoria must be consulted.*
- b) *Where development is within or may adversely affect land dedicated or reserved under the National Parks and Wildlife Act 1974—the NPWS must be consulted.*
- c) *Where development may adversely affect endangered fauna within the meaning of the National Parks and Wildlife Act 1974—the NPWS must be consulted.*
- d) *Where development may affect an Aboriginal site or any other place that is generally recognised as a place of cultural significance to the Aboriginal community—the NPWS must be consulted.*
- e) *Where development is within or may adversely affect a State Forest—the Forestry Commission must be consulted.*
- f) *Where development may affect boating safety—the MSB must be consulted.*

As the project may adversely impact on endangered fauna within the meaning of the *National Parks and Wildlife Act 1974*, an Aboriginal site, and a State Forest, consultation is required to be undertaken with DECCW (previously known as NPWS) and Forests NSW (Forestry Commission). Details of this consultation are provided in Section 4.

3.2.3 State Environmental Planning Policy 44 – Koala Habitat Protection

State Environmental Planning Policy 44 (SEPP 44) aims to encourage the ‘proper conservation and management of areas of natural vegetation that provide habitat for Koalas to ensure a permanent free-living population over their present range and reverse the current trend of Koala population decline’.

Schedule 1 of SEPP 44 lists the local government areas (LGAs) to which SEPP 44 applies. The site is within the Wakool and Murray LGAs which are listed under Schedule 1.



SEPP 44 requires that, before granting consent for Development Application under Part 4 of the EP&A Act, on land over 1 hectare in area, a consent authority must be satisfied as to whether or not the land is 'potential' and 'core' Koala habitat.

As the project is subject to Part 3A of the EP&A Act, SEPP 44 does not apply. Notwithstanding, the general principles of the SEPP have been considered.

Under the SEPP, potential Koala habitat is defined as 'an area of native vegetation where the trees of the types listed in Schedule 2 constitute at least 15% of the total number of trees in the upper or lower strata of the tree component'. Core Koala habitat, is defined as 'an area of land with a resident breeding population of Koalas, evidenced by attributes such as breeding females and recent sightings and historical records of a population'.

As discussed in Appendix C, the principles of SEPP 44 were addressed through targeted surveys for Koalas and Koala feed trees and searches for signs of recent Koala activity.

3.2.4 State Environmental Planning Policy (Rural Lands) 2007

The Rural Lands SEPP applies to land outside the Greater Metropolitan Region and, among other things, aims to facilitate the orderly and economic use and development of rural lands for rural and related purposes.

The SEPP sets out Rural Planning Principles and Rural Subdivision Principles that must be considered when a council is preparing a local environmental plan, and sets out matters to be considered by a consent authority when considering whether to grant consent to subdivision for the purposes of a dwelling, or the erection of a dwelling. It also contains provisions relating to rural lands planning panels that can be established to provide advice to the Director-General with respect to a rural lands development application that contravenes a development standard.

None of the provisions of this SEPP are of relevance to the project.

3.2.5 State Environmental Planning Policy No. 60 – Exempt and Complying Development

SEPP 60 applies to certain specified LGAs, however it does not apply to the Wakool or Murray LGAs. As such, SEPP 60 does not apply to the project.

3.2.6 State Environmental Planning Policy (Exempt and Complying Development Codes) 2008

The Exempt and Complying Development Codes SEPP came into force on 27 February 2009 and apply to the State. This SEPP identifies development that is deemed to be exempt or complying development. None of the works that form part of the project are identified in the SEPP as exempt or complying development.

3.3 Local environmental plans

The project is located on land that falls under the control of two Local Environmental Plans (LEPS), the Murray LEP 1989 and the Wakool LEP 1992.



3.3.1 Murray Local Environmental Plan 1989

The Murray LEP applies to the upstream (southern) component of the project. Under the Murray LEP, the project is located on land zoned 1(f) (Rural (Forests) Zone).

Clause 9 of the LEP states that the objective of the 1(f) zone is to:

'... enable the continuance or expansion of forestry and the development of associated purposes.'

The project is consistent with this objective as it would improve the ecological health of the Forest and would not impede continuance of forestry operations.

3.3.2 Wakool Local Environmental Plan 1992

The Wakool LEP applies to the downstream (northern) component of the project area. Under the Wakool LEP the project is located on land zoned 1(f) (Rural (Forests) Zone) and 1(a) (General Rural Zone). The project is considered to be consistent with the objectives of zone 1(a) and 1(f).

Clause 9 of the LEP states that the objective of the 1(a) zone is to:

The objectives of this zone are to promote the proper management and utilisation of resources by:

- a) *protecting, enhancing and conserving:*
 - i. *agricultural land in a manner which sustains its efficient and effective agricultural production potential,*
 - ii. *soil stability by controlling and locating development in accordance with soil capability,*
 - iii. *forests of existing and potential commercial value for timber production and of other value,*
 - iv. *valuable deposits of minerals, coal, petroleum and extractive materials by controlling the location of development for other purposes in order to ensure the efficient extraction of those deposits,*
 - v. *trees and other vegetation in environmentally sensitive areas where the conservation of the vegetation is significant to scenic amenity, recreation or wildlife habitat or is likely to control land degradation,*
 - vi. *water resources for use in the public interest,*
 - vii. *areas of significance for nature conservation, including areas with rare plants, wetlands and significant habitat, and*
 - viii. *places and buildings of archaeological or heritage significance, including the protection of aboriginal relics and places,*
- b) *preventing the unjustified development of prime crop and pasture land for purposes other than agriculture,*
- c) *facilitating farm adjustments,*
- d) *minimising the cost to the community of:*



- i. *fragmented and isolated development of rural land, and*
 - ii. *providing, extending and maintaining public amenities and services, and*
- e) *providing land for future urban development, for rural residential development and for development for other non-agricultural purposes, in accordance with the need for that development.*

The project is consistent with these objectives as it would improve the ecological health of the Forest by enhancing the flood regime. It would enhance an area that is of significance for nature conservation and of commercial value for timber production. Construction and operation of the project would implement measures to minimise adverse impacts on soils and landforms. The project would not involve unjustified development of prime crop or pasture land.

Clause 9 of the LEP states that the objective of the 1(f) zone is to:

'... enable the continuance or expansion of forestry and the development of associated purposes.'

The project is consistent with this objective as it would improve the ecological health of the Forest and would not impede continuance of forestry operations.

3.4 Other relevant legislation

3.4.1 Threatened Species Conservation Act 1995

The *Threatened Species Conservation Act 1995* (TSC Act) provides legal status for biota of conservation significance in NSW. The Act aims to, *inter alia*, 'conserve biological diversity and promote ecologically sustainable development'. It provides for:

- ▶ The listing of 'threatened species, populations and ecological communities' (threatened biota) with endangered species, populations and communities listed under Schedule 1, 'critically endangered' species and communities listed under Schedule 1A, vulnerable species and communities listed under Schedule 2;
- ▶ The listing of 'Key Threatening Processes' (KTPs) (under Schedule 3);
- ▶ The preparation and implementation of Recovery Plans and Threat Abatement Plans; and
- ▶ Requirements or otherwise for the preparation of Species Impact Statement (SIS). Projects assessed under Part 3A of the EP&A Act do not require preparation of a SIS.

The TSC Act has been addressed by the ecology assessment (Appendix C) through:

- ▶ Desktop assessment to identify the threatened biota that have been previously recorded within the locality of the site and hence have the potential to occur at the site and be affected by the project;
- ▶ Targeted field surveys for threatened biota;
- ▶ Habitat assessments, to determine whether habitat features and resources for threatened biota are present at the site, and hence whether threatened biota are likely to occur and be affected by the project;



- ▶ Identification of KTPs operating at the site, in terms of the extent, timing and severity of their operation;
- ▶ Assessment of the extent to which the project would affect the operation of any KTPs at the site;
- ▶ Development of suitable impact mitigation and environmental management measures for threatened biota, where required; and
- ▶ Assessment of potential impacts on threatened biota.

3.4.2 Native Vegetation Act 2003

The NSW Government released the regulations for the *Native Vegetation Act 2003* on 14 November 2005, which came into effect on 1 December 2005. The *Native Vegetation Act 2003* regulates the clearing of native vegetation on all land in NSW except for land listed in Schedule 1 of the Act. Excluded land under Schedule 1 of the Act includes National Parks and other conservation areas, State Forests and reserves, and urban areas. Specifically, urban areas, which are excluded, include areas zoned residential (but not rural residential), village, township, industrial or business.

The majority of the site is existing State Forest and exempt from the *Native Vegetation Act 2003*. Portions of the site on recently acquired freehold land outside the State Forests are also exempt because according to Section 75U(e) of the EP&A Act, an authorisation under Section 12 of the *Native Vegetation Act 2003* to clear native vegetation is not required for a project approved under Part 3A. Hence, the *Native Vegetation Act 2003* does not apply to the project.

3.4.3 Noxious Weeds Act 1993

The *Noxious Weeds Act 1993*, provides for the declaration of noxious weeds by the Minister of Agriculture. Weeds may be considered noxious on a National, State, Regional or Local scale. All private landowners, occupiers, public authorities and Councils are required to control noxious weeds on their land under Part 3 Division 1 of the *Noxious Weeds Act 1993*. As such, if present, noxious weeds on the site should be controlled in accordance with the control category specifications.

3.4.4 Forestry Act 1916

Under the *Forestry Act 1916*, Forests NSW is responsible for the control and management of State forests and other Crown-timber lands. The objectives of Forests NSW are defined in section 8A(1) of the *Forestry Act 1916* and include:

- (a) *to conserve and utilise the timber on Crown-timber lands and land owned by the commission or otherwise under its control or management to the best advantage of the State,*
- (b) *to provide adequate supplies of timber from Crown-timber lands and land owned by the commission or otherwise under its control or management for building, commercial, industrial, agricultural, mining and domestic purposes,*



- (c) *to preserve and improve, in accordance with good forestry practice, the soil resources and water catchment capabilities of Crown-timber lands and land owned by the commission or otherwise under its control or management,*
- (d) *to encourage the use of timber derived from trees grown in the State,*
- (e) *consistent with the use of State forests for the purposes of forestry and of flora reserves for the preservation of the native flora thereon:*
 - (i) *to promote and encourage their use as a recreation, and*
 - (ii) *to conserve birds and animals thereon, and*
- (f) *to provide natural resource environmental services (whether within or outside of New South Wales).*

The project is consistent with these objectives as it would improve water catchment capabilities of Crown-timber lands, and would implement all practical measures Forests NSW considers necessary to ensure the preservation and enhancement of the environment.

Clause 11(1) of the *Forestry Act 1916* defines the powers and duties of Forests NSW and states that, subject to the Act, Forests NSW:

shall have the control and management of State forests, timber reserves and flora reserves and shall control and manage them in such manner as best serves the public interest and, in so doing, may maintain and improve indigenous species of trees and may on State forests and timber reserves establish, maintain and improve plantations of indigenous species and exotic species, of trees,

The aim of the project is to improve the ecological condition of the Koondrook-Perricoota Forest. This is considered to be consistent with the duties and powers of Forests NSW as it would assist in management of the Forest that best serves the public interest.

3.4.5 Roads Act 1993

As the project would involve works that may dig up or disturb the surface of a public road, there is the potential for consent to be required under Section 138 of the *Roads Act 1993*. Under Section 75V(1) of the EP&A Act, this consent cannot be refused if it is necessary for the carrying out of an 'approved project' and is substantially consistent with an approval to carry out the project given under Part 3A.

3.4.6 National Parks and Wildlife Act 1974

The *National Parks and Wildlife Act 1974* (NPW Act) provides the basis for legal protection and management of Aboriginal sites and objects in NSW. The implementation of the Aboriginal heritage provisions in the Act is the responsibility of DECCW.

Section 87 of the NPW Act states that a permit may be issued to disturb or excavate archaeological sites or objects. Under section 90 of the NPW Act, it is an offence to knowingly destroy, deface or damage an object, except in accordance with an approval granted under that section.



As the project is subject to Part 3A of the EP&A Act, a permit under section 87 or consent under section 90 of the NPW Act is not required.

3.4.7 Fisheries Management Act 1994

The *Fisheries Management Act 1994* aims to conserve, develop and share the fishery resources of NSW for the benefit of present and future generations.

The *Fisheries Management Act 1994* lists threatened species of freshwater fish, aquatic invertebrate and macroinvertebrate species, endangered populations and aquatic ecological communities and key threatening processes. Potential impacts on species, populations and communities subject to the *Fisheries Management Act 1994* are assessed in Appendix C. Section 5A assessments of significance have been prepared for 'affected aquatic entities'. These assessments have concluded that the project incorporating measures to avoid or mitigate impacts is likely to avoid significant impacts on affected aquatic entities.

The project would involve activities that meet the definition of 'dredging' or 'reclamation' under Clause 198A of the *Fisheries Management Act 1994*. Under Section 201(1) of the FM Act, a person must not carry out dredging or reclamation work except under the authority of a permit issued by the Minister. The project does not require a permit under Section 201(1) of the *Fisheries Management Act 1994* because it is subject to approval under Part 3A of the EP&A Act and Section 75U(1) of the EP&A Act applies.

Under Clause 199 of the *Fisheries Management Act 1994*, the proponent is required to notify the Minister for Fisheries before it carries out or authorises the carrying out of dredging or reclamation work. The notice must be given in writing and the proponent must consider any matters raised by the Minister within 28 days after the notice is given.

Under Section 219(1) of the *Fisheries Management Act 1994*, it is an offence to block fish passage unless a permit has been issued under Section 220 of this Act. As detailed in Section 4.2.3, consultation has been undertaken with the Fish Passage Task Force (FPTF) which includes a representative from the NSW Department of Industry and Investment – Fisheries regarding the need for structures to provide for fish passage. A permit is not required under Section 220 because the project has been designed to it does not block fish passage.

3.4.8 Water Management Act 2000

The *Water Management Act 2000* is administered by NOW. The project involves a range of activities that meet the definition of activities requiring approval under the *Water Management Act 2000*, including:

- ▶ Water use approval – Section 89 of the *Water Management Act 2000*;
- ▶ Water management work approval – Section 90 of the *Water Management Act 2000*; and
- ▶ Controlled activity approval – Section 91 of the *Water Management Act 2000*.

As the project is subject to Part 3A of the EP&A Act, Section 75U(1) applies and these approvals are not required.



3.4.9 Protection of the Environment Operations Act 1997

The *Protection of the Environment Operations Act 1997* (POEO Act) regulates noise, air, land and water pollution. Schedule 1 defines scheduled activities for which an environment protection licence is required, and includes:

land-based extractive activity, meaning the extraction, processing or storage of extractive materials, either for sale or re-use, by means of excavation, blasting, tunnelling, quarrying or other such land-based methods.

An environment protection licence is required for activities that involve the extraction, processing or storage of more than 30,000 tonnes per year of extractive materials.

As the project would extract approximately 654,000 m³ of material for reuse in construction of the downstream levee, it exceeds the threshold of 30,000 tonnes per year and an environment protection licence is required.

Under Section 75V(1) of the EP&A Act, an environment protection licence under Chapter 3 of the POEO Act cannot be refused if it is required to carry out an approved project.

Under Section 120 of the POEO Act, it is an offence to pollute waters. As discussed in Chapter 10, there is the potential for the project to pollute waters during both the construction and operational phases. Section 122 states that it is a defence against proceedings under Part 5.3 of the POEO Act if the pollution was regulated by an environmental protection licence and the conditions of that licence were not contravened.

3.4.10 Heritage Act 1977

The *Heritage Act 1977* identifies and protects heritage items and is administered by the NSW Heritage Council and NSW Heritage Office. Any development that would impact on an item listed on the State Heritage Register requires approval from the Heritage Council under section 60 of the Act.

The Act's provisions also require that an excavation permit be obtained from the Heritage Council prior to commencement of works if disturbance to a site with known or potential archaeological relics is proposed.

The Act defines a *relic* as:

any deposit, artefact, object or material evidence that:

- a) relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement, and*
- b) is of State or local heritage significance.*

As the project is subject to Part 3A of the EP&A Act, approvals are not required under Part 4 or an excavation permit under Section 139 of the *Heritage Act 1977* would not be required.



3.5 Environment Protection and Biodiversity Conservation Act, 1999

The purpose of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is to ensure that actions likely to cause a significant impact on 'matters of national environmental significance' undergo an assessment and approval process. Under the EPBC Act, an action includes a project, undertaking, development or activity. An action that 'has, would have or is likely to have a significant impact on a matter of national environmental significance' is deemed to be a 'controlled action' and may not be undertaken without prior approval from the Commonwealth Minister for the Environment.

In January 2007 the Commonwealth and NSW governments signed a Bilateral Agreement which allows the Commonwealth Department of Environment, Water, Heritage and the Arts (DEWHA) to accredit the assessment regimes under Part 3A, Part 4 and Part 5 of the EP&A Act for assessment purposes under the EPBC Act. The Bilateral Agreement applies only to proposals that the Commonwealth Environment Minister has determined are controlled actions under the EPBC Act, with the exception of nuclear actions (DoP, 2007).

The EPBC Act identifies matters of national environmental significance as:

- World heritage properties;
- National heritage places;
- Wetlands of international importance (Ramsar wetlands);
- Threatened species and ecological communities;
- Migratory species;
- Commonwealth marine areas; and
- Nuclear actions (including uranium mining).

The Administrative Guidelines for the EPBC Act (DEH, 2006) set out criteria intended to assist in determining whether an action is controlled and hence requires approval. In particular, the Guidelines contain criteria for determining whether a proposed action is likely to have a 'significant impact' on a matter of national environmental significance (NES). Should the proponent deem the project likely to have a significant impact on a matter of NES, a referral to the Commonwealth Minister for the Environment would be undertaken to obtain a determination as to whether the proposal is a 'controlled action' requiring Commonwealth approval.

The project has the potential to impact on a range of species listed under the EPBC Act. It would be undertaken within the Koondrook-Perricoota Forest which is part of the Central Murray State Forests which is listed under the Ramsar convention as a wetland of international significance.

The project was referred to the Commonwealth on 6 October 2009. On 20 January 2010, DEWHA advised that the project is not a controlled action and does not require further assessment and approval under the EPBC Act before it can proceed.